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RECORD, CASE No. 14,167.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 191.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE CLARKE, EXECUTOR OF AUGUSTINE CLARKE, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED SEPTEMBER 24, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 16, 1893.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and ninety, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

GEORGE CLARKE, Executor of the Last Will and Testament of Augustine Clarke, Deceased,
vs.
THE LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILROAD COMPANY.
} No. 8415. Civil Action.

Be it remembered that heretofore, to wit, at the November term, 1887, of said court, on the 28th day of April, 1888, before the Honorable William A. Woods, one of the judges of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Harrison, Miller & Elam, his attorneys, and files his complaint herein in the words following, to wit:

The plaintiff, George Clarke, as executor of the last will and testament of Augustine Clarke, deceased, complains of the defendant, The Louisville, Evansville & St. Louis Railroad Company, and says—

That he, the plaintiff, is the duly appointed, qualified, and acting executor of the last will and testament of Augustine Clarke, deceased, having been duly nominated as such executor in said last will and qualified and authorized to act as such in the court
2 having probate jurisdiction in the county of Fayette and State of Kentucky.

And said plaintiff further avers that he is a citizen of the State of Kentucky and a resident of the city of Lexington, in said State; that the defendant is a railroad corporation organized, existing, and doing business under the laws of the States of Illinois and Indiana and a citizen of said last-named State; that said defendant is a common carrier of passengers for hire, owning and operating a line of railroad extending from Louisville, in the State of Kentucky, by way of Clark county, in the State of Indiana, westwardly through Floyd and other counties across the State of Indiana to Evansville, westwardly through the State of Illinois to St. Louis, and said railroad company was so existing, owning, and operating said railroad during the entire month of November, 1886.

This plaintiff further avers that on Thanksgiving day, being on or about the 25th day of November, 1886, said Augustine Clarke took passage as a passenger on the passenger train of said defendant railway company at Evansville, in the State of Indiana, intending to ride thereon to the city of Louisville, in the State of Kentucky, and before entering the car provided by said defendant for transportation of passengers he paid the usual and customary fare

charged by the defendant for the transportation of a passenger from said city of Evansville to said city of Louisville. Having entered said car of said defendant and while riding therein on said day, near the town of English, in the county of Crawford and State of Indiana, the said car in which said Augustine Clarke was so riding was violently thrown from the track and turned over, and by reason thereof said Augustine Clarke received very great and what proved to be fatal injuries, he having since died by reason of said injuries so received as aforesaid.

3 And this plaintiff avers that said accident occurred and said injuries were received by the said Augustine Clarke without any fault or negligence on the part of this plaintiff or upon the part of said Augustine Clarke, but solely by reason of the carelessness, negligence, and default of the defendant.

The plaintiff further avers that at the time and place where said accident occurred the railway track of said defendant upon which said Augustine Clarke was being transported was in a very bad condition and had been allowed to become and remain out of repair; that the ties upon which the rails of said track were laid were old, worn out, rotten, and insecurely laid in their places; that the rails were old, worn out, not properly laid, out of line, and not well fastened to the ties nor well fastened together, that the track was not well ballasted and had been so badly and negligently constructed and suffered to be and remain out of repair that it was unsafe and unfit for the rapid passage of trains over it.

The plaintiff avers that said train consisted of a locomotive and three cars, which said locomotive and cars were all in bad condition, worn out, and unfit for use in the transportation of passengers at a high rate of speed; that certain rods, bars, and bolts about said locomotive had been negligently suffered and permitted to become loose, misplaced, and out of repair so that they came in contact with the ground between and near the rails of said track.

The plaintiff further avers that said train at the time said car was thrown from the track as aforesaid was being run at a very high and dangerous rate of speed, to wit, at the rate of forty miles per hour or more, a rate which, upon the best roads and with the best machinery, is a very high rate of speed, but which upon

4 this road at that place in the then condition thereof, using said locomotive and cars, was grossly negligent and reckless and likely to result in accident and injury to passengers.

And plaintiff avers that by reason of said defective and unsafe condition of said locomotive and cars and the high rate of speed at which the same were being run said car was thrown from the track as aforesaid and said injuries inflicted upon said Augustine Clarke.

Said plaintiff further avers that at the time said car was so thrown from the track said Augustine Clarke was sitting in one of the seats thereof where it was his right and duty to be and when said car left the track as aforesaid he was thrown from his seat and as the car turned over he was partially thrown through one of the ventilating windows of said car with great force and greatly bruised, man-

gled, wrenched, and wounded about his head, back, spine, limbs, internal organs, and his whole person, so that he vo*l*ited blood and was thought to be then dead or dying.

And plaintiff avers that by reason of said injuries said Augustine Clarke became for the time unconscious, but lived and languished until the 23d day of February, 1888, when he died, in the city of Lexington and State of Kentucky, from the effect and by reason of said injuries.

The plaintiff avers that the said Augustine Clarke left surviving him a widow and — minor children, aged respectively — and — years.

The plaintiff further avers that at the time of the death of the said Augustine Clarke he was about forty-two years old, and at the time when said injuries occurred he was in the enjoyment of the best of health, as he had been for many years prior thereto; that previous to his injury his business was that of a builder and contractor and for many years prior thereto he had been doing each year a large and profitable business and earning by labor, skill, and experience as a contractor, builder, and superintendent of laborers the sum of five thousand dollars per annum, and during the whole of said time up to the time of his death he resided with his family, being the widow and childrem who survived him, and prior to said injuries from his earnings maintained, supported, and cared for them and superintended the education and attended to the welfare of his said children.

Plaintiff avers that the defendant, by its negligence, as herein alleged, caused the death of said Augustine Clarke in the manner aforesaid, and by reason of said death said surviving widow and children have been damaged in the sum of ten thousand dollars. Said widow and children are the next of kin to said Augustine Clarke.

Wherefore, in behalf of said next of kin, plaintiff prays judgment for ten thousand dollars and all proper relief.

HARRISON, MILLER & ELAM,
Att'ys for Plaintiff.

And afterwards, to wit, at the May term of said court, on the 20th day of May, 1888, before the Honorable William A. Woods, judge as aforesaid of said court, the following furtlier proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McDonald, Butler & Snow, its attorneys, and files its demurrer to the complaint herein in the words following, to wit:

Defendant demurs to plaintiff's complaint herein and assigns as ground of demurrer the following:

1. That said complainant does not state facts sufficient to constitute a cause of action.

Respectfully submitted.

McDONALD, BUTLER & SNOW.

And afterwards, to wit, at the November term, 1888, of said court on the 29th day of January, 1889, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon the court, being sufficiently advised in the premises, doth now overrule the demurrer to the complaint herein; to which ruling of the court the defendant now excepts.

And afterwards, to wit, at the November term, 1888, of said court, on the 2d day of February, 1889, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McDonald, Butler & Snow and Brown, Humphrey & Davie, its attorneys, and files its answer herein in the words following, to wit:

The defendant, for answer to the complaint herein, specifically denies each and every of the following allegations of the complaint, to wit:

That the plaintiff is the duly appointed, qualified, and acting executor of the last will and testament of Augustine Clarke, deceased, having been duly nominated as such executor in said will and qualified and authorized to act as such in the court having probate jurisdiction in the county of Fayette and State of Kentucky; that he is a citizen of the State of Kentucky and a resident of the city of Lexington, in said State; that the defendant is a railroad organization, organized, existing, and doing business under the laws
7 of the States of Illinois and Indiana and a citizen of said last-named State; that said defendant is a common carrier of passengers for hire, owning and operating a line of railroad extending from Louisville, in the State of Kentucky, by way of Clark county, in the State of Indiana, westwardly through Floyd and other counties across the State of Indiana to Evansville, westwardly through the State of Illinois to St. Louis, and that said railroad company was so existing, owning, and operating said railroad during the entire month of November, 1886.

And, further, the defendant admits and avers the following allegations of the complaint to be true to the following extent, namely. That on the 25th day of November, 1886, the Augustine Clarke in said complaint mentioned was on a railroad train of the defendant, and that while being so on said railroad train the said Augustine Clarke was, on said 25th day of November, 1886, injured, and except as above admitted the defendant specifically denies each and every of the said following allegations of said complaint, to wit:

That on Thanksgiving day, being on or about the 25th day of November, 1886, said Augustine Clarke took passage as a passenger on the passenger train of said defendant railway company at Evansville, in the State of Indiana, intending to ride thereon to the city of Louisville, in the State of Kentucky, and before entering the car provided by said defendant for transportation of passengers he paid the usual and customary fare charged by the defendant for the

transportation of a passenger from said city of Evansville to said city of Louisville; that having entered said car of said defendant, and while riding therein on said day, near the town of English, in the county of Crawford and State of Indiana, the said car in which said Augustine Clarke was so riding was violently thrown from
8 the track and turned over, and by reason thereof said Augustine Clarke received very great and what proved to be fatal injuries, he having since died by reason of said injuries so received as aforesaid.

And the defendant specifically denies each and every of the following allegations of the complaint herein, to wit:

That said accident occurred and said injuries were received by the said Augustine Clarke without any fault or negligence on the part of the plaintiff or upon the part of said Augustine Clarke, but solely by reason of the carelessness, negligence, and fault of the defendant; that at the time and place where said accident occurred the railway track of said defendant upon which said Augustine Clarke was being transported was in very bad condition and had been allowed to become and remain out of repair; that the ties upon which the rails of said track were laid were old, worn out, rotten, and insecurely laid in their places; that the rails were old, worn out, not properly laid, out of line, and not well fastened to the ties, nor well fastened together; that the track was not well ballasted and had been so badly and negligently constructed and suffered to be and remain out of repair that it was unsafe and unfit for the rapid passage of trains over it; that said train consisted of a locomotive and three cars, which said locomotive and cars were all in bad condition, worn out, and unfit for use in the transportation of passengers at a high rate of speed; that certain rods, bars, and bolts about said locomotive had been negligently suffered and permitted to become loose, misplaced, and out of repair, so that they came in contact with the ground between and near the rails of said track; that said train, at the time said car was thrown from the track as aforesaid, was being run at a very high and dangerous
9 rate of speed, to wit, at the rate of forty miles per hour or more, a rate which, upon the best roads and with the best machinery, is a very high rate of speed, but which upon this road at that place in the then condition thereof, using said locomotive and cars, was grossly negligent and reckless and likely to result in accident and injury to passengers; that by reason of said defective and unsafe condition of the defendant's railroad track and said defective and unsafe condition of said locomotive and cars and the high rate of speed at which the same were being run said car was thrown from the track as aforesaid and said injuries inflicted upon said Augustine Clarke; that at the time said car was so thrown from the track said Augustine Clarke was sitting in one of the seats thereof, where it was his right and duty to be, and when said car left the track as aforesaid he was thrown from his seat, and as the car turned over he was partially thrown through one of the ventilating windows of said car with great force and greatly bruised, mangled, wrenched, and wounded about his head, back, spine, limbs,

internal organs, and his whole person, so that he vomited blood and was thought to be then dead or dying.

And, further, the defendant admits and avers the following allegations of the complaint to be true to the following extent, namely, that on the 23d day of February, 1888, the said Augustine Clarke died, and except as above admitted the defendant specifically denies each and every of the said following allegations of the complaint, to wit:

That by reason of said injuries said Augustine Clark became for the time unconscious, but lived and languished until the 23d day of February, 1888, when he died in the city of Lexington
10 and State of Kentucky from the effect and by reason of said injuries; that the said Augustine Clarke left surviving him a widow and — minor children, aged respectively — and — years; that at the time of the death of the said Augustine Clarke he was about forty-two years old, and at the time when said injuries occurred he was in the enjoyment of the best of health, as he had been for many years prior thereto; that previous to his injury his business was that of a builder and contractor, and for many years prior thereto he had been doing each year a large and profitable business and earning by labor, skill, and experience as a contractor, builder, and superintendent of laborers the sum of five thousand dollars per annum; that during the whole of said time up to the time of his death he resided with his family, being the widow and children who survived him, and prior to said injuries from his earnings maintained, supported, and cared for them, and superintended the education and attended to the welfare of his said children; that the defendant by its negligence caused the death of said Augustine Clarke in the manner aforesaid, and by reason of said death said surviving widow and children have been damaged in the sum of ten thousand dollars; that said widow and children are the next of kin to said Augustine Clarke.

Wherefore defendant demands judgment for costs.

BROWN, HUMPHREY & DAVIE,
McDONALD, BUTLER & SNOW,
Attorneys for Defendant.

And afterwards, to wit, at the November term, 1889, of said court, on the 30th day of April, 1890, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and file their stipula-
11 tion herein in the words following, to wit:

All objections to the depositions of Doctors Whitney and Skillman being in the narrative form are hereby waived, and it is agreed that on the trial of said cause said depositions shall be read in evidence, so far as the same are competent and relevant, in like manner as if said depositions had been taken by questions and answers.

And it is further agreed that on the trial of the above-entitled cause all the depositions heretofore taken in the suit of Augustine

Clark against said railroad company, being cause number 8363 and yet pending in this court, shall be read in evidence in like manner as if they had been taken in this cause, subject, however, to all objections to their competency and relevancy.

WINTER & ELAM, *Att'ys for Pl'ffs.*
ALEX. P. HUMPHREY, *For Def't.*
McDONALD, BUTLER & SNOW,
For Def't.

And afterwards, to wit, at the May term of said court, on the 2d day of July, 1890, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by Winter and Elam, his attorneys, and the defendant by McDonald, Butler and Snow, its attorneys, and, this cause now coming on to be tried, here comes a jury, to wit, J. R. Marott, Daniel Hazard, James A. McKenzie, Hiram Julian, Joseph Staub, David Powell, Isaac L. Frankem, Peter Zinn, J. S. Van Buren, C. Barney, Isaac Russell, and Paul H. Krauss, who, being duly impanneled and sworn and having partially heard the evidence herein, are by the court allowed to separate until the calling of this cause on to-morrow morning.

12 And afterwards, to wit, at the May term of said court, on the 3d day of July, 1890, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties by their respective attorneys, and the jury heretofore impanneled and sworn in this cause also come, and, having heard the residue of the evidence and the argument of counsel and charge of the court herein, now return into court the verdict following:

We, the jury, find for the plaintiff and assess the damages at nine thousand dollars.

D. HAZZARD, *Foreman.*

And afterwards, to wit, at the May term of said court, on the 16th day of July, 1890, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and the defendant now files its bill of exceptions No. 1 and its bill of exceptions No. 2 herein, in the words following, to wit:

Bill of Exceptions No. 1.

Exceptions taken by the defendant to the rulings of the court in the admission of testimony.

Be it remembered that on the trial of the above cause the counsel for the plaintiff introduced GEORGE CLARK, the executor of Augustine Clark, deceased, as a witness on behalf of the plaintiff, and in

the progress of the examination of the said witness, and as a part of his examination-in-chief, the following questions and answers were permitted by the court to go to the jury over the objections of the defendant's attorney, as therein stated:

Questions by Mr. ELAM:

13 Q. About how much was Augustine Clark making in his business at the time of this accident—about how much per year was his business?

Objected to by counsel for defendant as incompetent, irrelevant, and immaterial.

The court overruled the objection; to which ruling the defendant, by counsel, then and there duly excepted.

A. We were doing a very profitable business. I suppose our profits over and above our living expenses would run from four to seven thousand dollars a year.

Q. Over and above living expenses, you mean?

A. Yes, sir.

Q. That is, after each partner had taken out support for his family?

A. Yes, sir.

Q. About how much was Augustine drawing for his family from the firm, about how much a year?

A. I used to keep the books. I was the book-keeper, and all charges came through me and all moneys that he drew from the firm came through me. His yearly expenditure averaged from 13 to 15 and 16 hundred dollars a year. He used to draw that much from the firm.

Q. Then the profits you speak of were over and above that?

A. Yes, sir.

Q. He had his share in those profits?

A. Yes, sir.

Q. Making his whole income from the firm about how much?

A. His whole income from the firm was about three or four thousand dollars a year.

14 Mr. MCDONALD: We object to this testimony as incompetent, irrelevant, and immaterial, and ask the court to strike it out.

The court overruled the objection and motion to strike out; to which ruling the defendant, by counsel, then and there duly excepted.

Be it also remembered that on the said trial the counsel for the plaintiff introduced as a witness one JAMES GREEN, who, after being sworn, testified as follows:

Q. State your name to the court and jury.

A. James Green.

Q. What is your business?

A. I am the State agent of the Berkshire Life Insurance Company.

Q. How long have you been engaged in the life insurance business?

A. About 22 years.

Q. I will ask you if you are familiar with the tables in use in your business by which the expectancy of life is computed.

A. Yes, sir; considerably so. I have frequent occasion to refer to them.

Q. What tables do you use?

A. In our office we use largely the Carlisle tables.

Q. Are those the tables most commonly used?

A. Very generally, at least. I am hardly able to say they are more used than any others, but very generally. It is a table with an established reputation for accuracy.

After testifying as above the court permitted the following questions and answers to go to the jury over the objection of defendant's attorney as therein shown, to wit:

Q. Can you say what is the expectancy of life for a man in health who is forty-four years old, according to the Carlisle tables?

Objected to by counsel for defendant as incompetent, irrelevant, and immaterial.

The court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

A. I would have to refer to the tables.

Q. Refer to them and refresh your memory. I suppose no man carries them all in his head.

A. At the age of 44 we should expect a man to live twenty-five years and a fraction over—twenty-five years and eighty-five one-hundre-ths.

Q. At forty-five what is the expectency?

A. About twenty-four years and one-third—that is, twenty-four years and four hundred and fifty-four one-thousandths.

And inasmuch as the above exceptions do not otherwise appear of record in this cause the defendant prays the court to sign and seal this its bill of exceptions and make the same a part of the record in this cause, which is accordingly done.

WM. A. WOODS. [L. S.]

Bill of Exceptions No. 2.

Be it remembered that on the trial of the above case there was evidence given tending to prove that the deceased, Augustine Clark, was a passenger on the defendant's road on or about the 25th day of November, 1886, and that on that day, in the district of Indiana, the train of cars of the defendant, including the car in which the said Clark was a passenger, while running at the rate of about

twenty-five miles an hour, were thrown from the track, and by the overturning of the car in which the said Clark was a pas-
16 senger he received the injury complained of in the plaintiff's complaint. There was also evidence tending to prove that the accident by which the cars became derailed was caused by the falling down upon the track of the forward end of the iron brace which supported the pilot of the engine drawing the train, and that the forward trucks of the engine had in passing over said bar been thrown from the rails. There was also evidence tending to prove that the cross-beam of the pilot, to which the forward end of the iron brace was bolted, had been fractured, and the bolts which held the brace in its proper place had been broken by striking upon or against some obstruction on the track that had escaped observation; but there was no evidence to indicate at what point on the road the cross-beam of the pilot had been fractured and the bolts broken, except that there was evidence tending to prove that they were in sound condition at Huntingburg, a station some thirty miles west of the place where the accident occurred.

There was also evidence tending to prove that there was, at the place where the accident occurred, a force of section hands under a section foreman; that the section of the road under charge of this force was some four miles and a half in length, and that the accident occurred about midway of the section; that on the same day of the accident and a few hours before it occurred this force, under the charge of the foreman, passed over the section and over the place where the accident occurred, and at that time there was no obstruction on the track that could have caused the accident, and that the road-bed and track was in good condition. There was also evidence tending to prove that the road-bed and track of the defendant's road was inspected daily by the section foreman having charge of the several sections or divisions thereof or by men
17 under their charge especially assigned to that duty.

There was also evidence tending to prove that the engine had been duly and carefully inspected on the evening before the accident and in the morning when taken out for the purpose of starting upon the run in which the accident occurred, and again at Huntingburg, being the last principal station before reaching the point at which the accident occurred, and that, so far as could be known by the application of the usual inspection and tests, the said engine, including the said cross-beam of the pilot and pilot bar, *were* sound and in good condition when the train left Huntingburg, a distance of about thirty miles from the place of the accident.

And thereupon, at the proper time, the defendant requested the court in writing to instruct the jury as follows:

No. 2. "The railroad company, as a common carrier, is bound to exercise the highest degree of care and skill usual in the operation of railroads in the transportation of its passengers, and any failure so to do, if injury resulted therefrom, would be deemed a wrongful act within the meaning of the law under which this action is brought; but the railroad company is not liable for injuries resulting from unavoidable accident against which the exercise of the

highest degree of prudence and foresight usually and practically employed in the management of railroads could not provide, and if the accident involved in this suit was of that character the railroad company is not liable in this action." But the court refused so to instruct the jury.

The defendant at the same time requested the court in writing to give the jury the following instruction:

No. 3. "The obligation which the law imposes upon railroad
18 companies as common carriers is to employ the utmost skill and prudence in the management of its road, as usually applied, in procuring for and operating its road with the best approved machinery, rolling stock, and appliances, and if such care has been exercised in the case under consideration and, notwithstanding such exercise of care and prudence, the accident occurred by which the death of the decedent was caused, the railroad company is not liable, and your verdict should be for the defendant." But the court refused so to instruct the jury.

The defendant at the same time requested the court in writing to give the jury the following instruction:

No. 4. "If the jury shall find that the defendant in this case exercised the highest degree of such skill, prudence, and foresight as is usually applied in the management of railroads under like circumstances and conditions as the defendant railroad, the defendant is not liable under this statute, although the jury should find that the death of Augustine Clark, whom the plaintiff represents as executor, was caused by an injury received on defendant's railroad." But the court refused so to instruct the jury.

The defendant at the same time requested the court in writing to give the jury the following instruction:

No. 6. "If the jury shall find that the accident by which the injury to the decedent occurred was caused by an obstruction on the track, it is not incumbent upon the defendant to show that any such obstruction upon the track was placed upon the track without the agency of the defendant. The defendant is bound to show only such inspection of the track as is consistent with the highest degree of such prudence and skill as is usually and practically applied to
19 the management of railroads under like circumstances and conditions as the defendant railway." But the court refused to give each and every of said instructions to the jury, and, on its own motion, instead thereof instructed the jury as elsewhere in the record appears; to which refusal of the court to give each of said instructions the said defendant then and there and at the proper time severally excepted and prays that this its bill of exceptions may be made a part of the record in this cause.'

Be it further remembered that at the trial of the above cause there was evidence given tending to prove that the deceased, Augustine Clark, had left him surviving a widow, Sarah E. Clark, and four children, one of whom has since died leaving no issue; that the three surviving children are all minors, the eldest being but twelve years of age and the youngest but five years of age, and that the deceased was about forty-five years of age at the time of his

death, and that for some years previous to the time of receiving the injury complained of he had been engaged in partnership with his brother, George Clark, as builders and contractors in and near Lexington, Ky., and that their business had become quite profitable, but there was no evidence given or offered to show the condition of his estate at the time of his death.

At the proper time the defendant requested the court, in writing, to instruct the jury as follows:

No. 8. "The measure of damages, if the jury should find for the plaintiff, can only be such pecuniary loss and damage as the widow and heirs-at-law of the decedent may have suffered on account of his death. No other kind of damage is recoverable in this form of action;" but the court refused to give said instruction. On the contrary, the court, of its own motion, instructed the jury on this
20 subject as elsewhere is shown in the record. To the refusal of the court to give such instruction as requested the defendant at the time excepted and prays that this its bill of exceptions be made a part of the record in this cause.

Be it also further remembered that on the trial of the above cause it was proven as a fact and admitted to be true that the said decedent, Augustine Clark, received the injury complained of in the plaintiff's complaint on the 25th day of November, 1886, and that he died on the 23d day of February, 1888.

And thereupon, at the proper time, the defendant requested the court, in writing, to instruct the jury as follows:

No. 5. "If the jury shall find that the death of Augustine Clark occurred more than a year and a day after his injury complained of herein, it is the legal presumption that the death of Augustine Clark was not caused by the injury complained of, and the jury will find for the defendant;" but the court refused to give said instruction and instead thereof, on its own motion, instructed the jury on that subject as elsewhere in this record appears. To which rulings of the court in refusing to give said instructions the defendant at the time excepted and prayed that the same be made a part of the record in this cause.

There was also evidence tending to prove that the road-bed of defendant's railroad at the place and time when and where the accident occurred had been narrowed by being washed away by rains, so that some of the cross-ties on the south side thereof were unsupported at the ends; that the cross-ties were in part rotten and otherwise defective; that the rails were not securely spiked thereto; that the locomotive remained on the rails except as to its forward
21 trucks; that the south rail under the coach in which the plaintiff was had slipped, with a part of the ties to which it was attached, from the road-bed with the coach and remained under the coach where it was overturned, and that the speed at which the train was being run at the time the accident occurred was much faster than its schedule time, which was thirty miles an hour.

Thereupon the court, of its own motion, gave the following charges to the jury respecting the matters set forth in the instructions asked for by the defendant and refused by the court:

"This is an action by the plaintiff, as executor, for the death of the testator, and is prosecuted under the statute of the State for the benefit of the widow and children of the deceased. The statute reads as follows (Rev. Stat., 1881, sec. 284):

'When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.'

It is admitted that the deceased was a passenger on the defendant's road, and that in the derailment and overturning of the train upon which he was riding he received severe injuries, and afterwards, and after the lapse of more than a year, he died. It is not admitted, though hardly disputed by counsel, that the injuries so received caused the death, and that is a question of fact for
22 you. Unless the injuries so received were the proximate cause of the death, the defendant is not liable in this action. I am asked to instruct you that unless the death occurred within a year and a day from the time of the injury, the action is not maintainable, but I decline to so instruct. The question is whether the injury caused the death, and, while the lapse of time is proper to be considered in determining that question, it is not conclusive of it.

The more important question in this case is whether the injury suffered by the deceased was caused by the negligence of the defendant. A railroad company or other common carrier of passengers does not warrant the safety of those carried, but to that end is bound to exercise the highest degree of skill and foresight reasonably possible and practicable, and any failure to employ such skill and foresight is negligence which, if it causes injury, makes the carrier liable.

This degree of care is required in respect to every consideration affecting or likely to affect the result—that is to say, in the case of a railway company, in respect to the condition of its road-bed and tracks, as well as of its engines and cars, including their construction and repair, the manner of inspecting, caring for, &c., and also to the manner of running and the speed of trains.

Latent or concealed defects in machinery, rails, or road-bed which could not have been discovered by reasonable care in the manufacture or construction or by proper inspection, the carrier is not responsible for, and if in this case you find that the accident resulted from such a cause the defendant is not liable.

The accident having happened and the death of the passenger having resulted (if you shall so find), it is incumbent on the
23 defendant to show to your satisfaction that it was free from blame in the premises—that is, that the accident was produced by causes against which they could not by the exercise of

the highest practicable and reasonable skill have successfully guarded.

If the accident was caused solely by the dropping of the brace-bar of the cow-catcher, and that occurred without negligence in the construction, repair, and inspection of the engine in that particular, and without fault in inspecting the track at a reasonable time before the passage of the train, then the defendant is not liable; but counsel for the plaintiff insist that at and near the place of the accident the road-bed, ties, and track were defective and out of repair in important respects, and that these defects caused or in large degree contributed to the accident and injury, and if this was so the company is liable.

If you should find for the plaintiff you will then consider what damages should be awarded. On this subject I am asked to instruct that you can allow only for such pecuniary loss and damages as the widow and heirs-at-law of the decedent may have suffered on account of his death.

Some years ago, in a case in this court involving this question, I instructed that the jury was not restricted in its award of damage to the proof of pecuniary loss suffered by the widow or next of kin for whose benefit the action was prosecuted, and, if left to myself, should so rule now. The statute provides that the damages awarded shall 'be distributed in the same manner as personal property of the deceased,' and this, it seems to me, is inconsistent with the proposition that the damages to be allowed cannot exceed the proven pecuniary loss. Some of the next of kin might be dependant and shown to have a pecuniary interest in the life of the deceased,
24 and others to have no such interest, and yet the damages allowed must go to those who had no such interest as well and as much as to those on account of whose interest it was allowable; but the supreme court of the State in a somewhat recent case, as I understand, has put an interpretation upon this statute which is binding upon this and other courts, and in accordance with that decision, as I remember it, I instruct you and for the purposes of this case you will accept it as the law that you will allow only the pecuniary loss suffered by the widow and surviving children on account of this death, not exceeding the limit of ten thousand dollars fixed by the statute."

To which instructions so given by the court, and to each and every thereof, the defendant at the time excepted.

And whereas the several matters set forth above, embracing the exceptions of the defendant to the rulings of the court as therein set out, and which exceptions were duly and properly taken and entered, as also the instructions which the court of its own motion gave to the jury, do not otherwise sufficiently appear of record in this cause, the undersigned judge of said court, sitting at the trial, hereby certifies, signs, and seals, and makes the same and the matters contained in this the defendant's bill of exceptions a part of the record in this cause.

WM. A. WOODS. [SEAL.]

And at the same time the defendant also files its motion for a new trial herein in the words following, to wit:

Comes now the defendant, by McDonald, Butler & Snow, its attorneys, and moves the court for a new trial in this cause for the following reasons:

Errors of Law Occurring at the Trial and Excepted to at the Time by the Defendant.

25 1. The court erred in admitting certain improper and irrelevant testimony over the objection of the defendant, as elsewhere in this record appears by proper bill of exceptions.

2. The court erred in instructions given by it to the jury over the objection of the defendant, as elsewhere in this record appears by proper bill of exceptions.

3. The court erred in refusing to instruct the jury as requested by the defendant, as elsewhere in this record appears by proper bill of exceptions.

Objections to the Verdict.

The verdict of the jury is contrary to law and is not sustained by sufficient evidence.

All of which is respectfully submitted.

McDONALD, BUTLER & SNOW,
Attorneys for Defendant.

And the court, having heard the argument of counsel and being sufficiently advised in the premises, doth now overrule said motion for a new trial herein.

And afterwards, to wit, at the May term of said court, on the 17th day of July, 1890, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by Winter & Elam, his attorneys, and the defendant by McDonald, Butler & Snow, its attorneys; and thereupon the defendant files its motion in arrest of judgment herein in the words following, to wit:

The defendant moves that judgment herein be arrested for the following reasons:

1. The declaration of the plaintiff herein and the matters therein contained, in manner and form as the same are above stated
26 and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against said defendant.

2. The complaint herein does not state facts sufficient to constitute a cause of action.

McDONALD, BUTLER & SNOW,
Attorneys for Plaintiff.

And the court, having heard counsel and being sufficiently advised in the premises, doth now overrule said motion in arrest of judgment; to which ruling of the court the defendant, by his attorneys, excepts; and thereupon the plaintiff files his motion for judgment upon the verdict herein in the words following, to wit:

George Clark, executor, as plaintiff in the above-entitled cause, moves the court for judgment in his favor on the verdict of the jury and in accordance therewith, and that said judgment be entered as bearing interest from the date of the return of the verdict by the jury.

WINTER & ELAM,
Att'ys for Plaintiff.

And the court, having duly considered said motion and being sufficiently advised, doth now sustain the same; to which ruling of the court the defendant, by his attorneys, excepts.

And the defendant now files his bill of exceptions No. 3 and bill of exceptions No. 4 herein in the words following, to wit:

Bill of Exceptions No. 3.

Be it remembered that after the rendition of the verdict herein and after the filing of the motion for a new trial herein, and after said motion for a new trial had been overruled by the court, the defendant moved that judgment be arrested; which said motion was in the words and figures following:

27 The defendant moves that judgment herein be arrested for the following reasons:

1. The declaration of the plaintiff herein and the matters and things therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against said defendant.

2. The complaint herein does not state facts sufficient to constitute a cause of action; which motion the court overruled; to which ruling of the court the defendant, by counsel, then and there duly excepted.

And inasmuch as the foregoing matters do not otherwise fully appear of record herein the defendant prays the court to sign and seal this its bill of exceptions herein and make the same a part of the record, which is accordingly done this 17th day of July, 1890.

WM. A. WOODS.

Bill of Exceptions No. 4.

Be it remembered that after the filing of the motion in arrest of judgment herein and after the court had overruled the same the plaintiff moved the court for judgment on the verdict and for an allowance of interest on the judgment from the date of rendition of

the verdict; which motion was in the words and figures following, to wit: "George Clarke, executor, as plaintiff in the above-entitled cause, moves the court for judgment in his favor on the verdict of the jury and in accordance therewith, and that said judgment be entered as bearing interest from the date of the return of the verdict by the jury;" to which motion the defendant, by its counsel, objected, but the court overruled said objection and granted said motion and ordered the judgment when entered to be so entered;
28 to which ruling of the court the defendant, by its counsel, then and there excepted.

And inasmuch as the foregoing matters do not otherwise fully appear of record herein the defendant prays the court to sign and seal this its bill of exceptions and make the same a part of the record in this cause, which is accordingly done this 17th day of July, 1890.

WM. A. WOODS.

It is therefore considered by the court that the plaintiff do have and recover of said defendant, The Louisville, Evansville & St. Louis Railroad Company, said sum of nine thousand dollars ($9,000), with interest at six per cent. per annum from July 3d, 1890, the date of the rendition of the verdict herein to date, to wit, nine thousand and twenty-one dollars ($9,021), together with his costs and charges herein expended, taxed at $——.

And afterwards, to wit, at the May term of said court, on the 24th day of July, 1890, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon the defendant prays a writ of error herein to the Supreme Court of the United States, which is allowed by the court upon its filing a bond in error in the penalty of twelve thousand dollars ($12,000), with sufficient sureties, to be approved by the judge of this court.

And said defendant now files its bond in error in the penalty of twelve thousand dollars ($12,000), with D. J. Mackey surety thereon, which bond is now approved by the court.

And said bond is in the words following, to wit:

29 Know all men by these presents that we, The Louisville, Evansville and Saint Louis Railroad Company, as principal, and David J. Mackey, as surety, are held and firmly bound unto the above-named George Clarke, as executor of Augustine Clarke, defendant in error, in the sum of twelve thousand dollars ($12,000), to be paid to the said George Clarke, as executor as aforesaid; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this 18th day of July, 1890.

Whereas the above-named The Louisville, Evansville and Saint Louis Railroad Company hath prosecuted its writ of error to the Supreme Court of the United States to reverse the judgment ren-

dered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above-named The Louisville, Evansville and Saint Louis Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged or awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise in full force.

LOUISVILLE, EVANSVILLE & ST. LOUIS RAILROAD,
By D. J. MACKEY. [SEAL.]
D. J. MACKEY. [SEAL.]

Sealed and delivered in presence of—
J. E. IGLEHART.

Taken and approved by me this eighteenth day of July, 1890.

UNITED STATES OF AMERICA, } ss:
District of Indiana, }

Before me, J. W. Wartmann, deputy clerk of the circuit court of the United States for the district of Indiana, at the city of
30 Evansville, personally appeared David J. Mackey and acknowledged that, as president of the Louisville, Evansville and Saint Louis Railroad Company, he executed the foregoing bond on behalf of said corporation and directed the seal of said corporation to be thereto attached, and also personally appeared David J. Mackey and acknowledged the execution of the foregoing bond, as surety for the plaintiff in error, for the uses and purposes therein expressed.

Witness my hand and the seal of said court this 18th day of July, 1890.

J. W. WARTMANN, [SEAL.]
Deputy Clerk U. S. Circuit Court, Dist. Indiana.

Approved in open court this 24th day of July, 1890.
W. A. WOODS.

31 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States within and for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record on the case of George Clarke, executor, &c., against the Louisville, Evansville and St. Louis Railroad Company as fully as the same remains upon the records now in my custody.

Seal Circuit Court of the United States, District of Indiana.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 29th day of July, 1890.

NOBLE C. BUTLER, *Clerk.*

32 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of the judgment in a plea which is in the said circuit court, before you, between George Clarke, executor of the last will and testament of Augustine Clarke, deceased, and The Louisville, Evansville and St. Louis Railroad Company, a manifest error hath happened, to the great damage of the said The Louisville, Evansville & St. Louis Railroad Company, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal Circuit Court of the United States, District of Indiana.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 24th day of July, A. D. 1890.

NOBLE C. BUTLER, *Clerk.*

33 UNITED STATES OF AMERICA:

To George Clarke, executor of the last will and testament of Augustine Clarke, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein The Louisville, Evansville and St. Louis Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Circuit Court of the United States, District of Indiana.

Witness the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court, this 25 day of July, — the year of our Lord one thousand eight hundred and ninety.

WM. A. WOODS.

34 We acknowledge service of the foregoing citation this 26th day of July, 1890.

WINTER & ELAM,
Attorneys for Defendant in Error.

35 In the Supreme Court of the United States.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS R. R. CO., Plaintiff in Error, vs. GEORGE CLARKE, Executor of the Last Will and Testament of Augustine Clarke, Deceased, Defendant in Error.	Error to the Circuit Court of the United States for the District of Indiana.

Comes now the plaintiff in error, The Louisville, Evansville and St. Louis Railroad Company, and makes its assignment of errors in the above-entitled cause as follows, to wit:

The said plaintiff in error avers that there was and is manifest error in the judgment and proceedings of the above-entitled cause in this, to wit:

1. The court below erred in overruling the demurrer of the plaintiff in error to the declaration of complaint of the defendant in error.

2. On the trial of the cause the court below erred in permitting irrelevant and improper evidence to go to the jury as shown in bill of exceptions No. 1 in this record.

3. The court below erred in refusing to instruct the jury as requested by the plaintiff in error and shown in bill of exceptions No. 2, duly incorporated in this record, as follows:

In refusing to instruct the jury as embraced in request No. 2 of said proposed instruction; in refusing to instruct the jury as requested by the plaintiff in error in No. 3 of said proposed instructions; in refusing to instruct the jury as requested by the plaintiff in error in No. 4 of the said proposed instructions; in re-

36 fusing to instruct the jury as requested by the plaintiff in error in No. 6 of the proposed instructions; each and every of which instructions contain the law and were properly applicable to the facts of the case, as shown by said bill of exceptions.

4. The court below also erred in refusing to instruct the jury in writing as contained in the proposed instruction No. 8, tendered by the plaintiff in error; also in refusing to instruct the jury as proposed in instruction No. 5 of the proposed instructions of the plaintiff in error; all of which errors were duly and properly reserved by the plaintiff in error at the time, as will in full and at large appear in bill of exceptions No. 2 above referred to.

5. The court below also erred in the instructions given of its own motion, as set out at length in bill of exceptions No. 2 above referred to, and which exceptions were properly taken at the time.

6. The court below erred in overruling the motion of the plaintiff in error in arrest of judgment and in entering the judgment for the defendant in error which appears in the record in this cause.

For the above and foregoing errors, and for other manifest errors in said record, which fully appear therein, said plaintiff in error prays the reversal of this cause.

J. E. McDONALD,
JOHN M. BUTLER,
ALPHEUS H. SNOW,
Attorneys for the Plaintiff in Error.

37 [Endorsed:] In the Supreme Court of the United States. Error to the circuit court of the United States for the district of Indiana. Louisville, Evansville & St. Louis R. R. Co., plaintiff in error, *vs.* George Clarke, executor of Augustine Clarke, dec'sed, defendant in error. Joseph E. McDonald, John M. Butler, Alpheus H. Snow, attorneys for the plaintiff in error.

Endorsed on cover: Case No. 14,167. Indiana C. C. U. S. No. 191. The Louisville, Evansville and St. Louis Railroad Company, plaintiff in error, *vs.* George Clarke, executor of Augustine Clarke, deceased. Filed September 24, 1890.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

LOUISVILLE, EVANSVILLE & ST. LOUIS RAILROAD COMPANY, Plaintiff in Error,

v.

GEORGE CLARK, EXECUTOR OF AUGUSTINE CLARK, DECEASED, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Indiana.

Brief for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

LOUISVILLE, EVANSVILLE & ST. LOUIS RAILROAD COMPANY, Plaintiff in Error,

v.

GEORGE CLARK, EXECUTOR OF AUGUSTINE CLARK, DECEASED, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Indiana.

STATEMENT OF THE CASE.

This was an action by George Clark, Executor of the last will and testament of Augustine Clark, deceased, against the Louisville, Evansville and St. Louis Railroad Company, under a statute of the State of Indiana, to recover damages alleged to have accrued to the plaintiff by the death of Augustine Clark, who was injured while a passenger upon the railroad of the defendant between Evansville and Louisville. The declaration or complaint avers that the plaintiff has been duly appointed Executor, that he is a citizen and resident of the State of Kentucky, that the defendant

is a railroad corporation, organized under the laws of the States of Indiana and Illinois, and that on the 25th day of November, 1886, said Augustine Clark took passage, as a passenger, upon the passenger train of the defendant, at Evansville, intending to ride thereon to the city of Louisville, having paid the usual and customary fare, and that while so riding, near the town of English, in the county of Crawford and State of Indiana, the car in which he was riding was turned over, whereby he was injured, and from which injuries he subsequently died; that the injuries received were received without fault on the part of said Augustine Clark, or of the plaintiff; that the track of the defendant railroad where the accident occurred, was in bad condition and out of repair, that the ties were old, worn out, rotten and insecurely laid, out of line, not well fastened; that the track was not well ballasted, and had been so badly and negligently constructed, and suffered to be and remain out of repair, that it was unfit and unsafe for the rapid passage of trains over it; that the train consisted of a locomotive and three cars, which were all in bad condition, worn out and unfit for use in the transportion of passengers at a high rate of speed; that certain bars, rods and bolts about said locomotive had been negligently suffered and permitted to become loose, misplaced and out of repair so that they came in contact with the ground between and near the rails of the track; that at the time of the accident the train was being run at a very high and dangerous rate of speed, to-wit, forty miles an hour, which, upon this road, under these conditions, using said locomotive and cars, was grossly negligent, reckless and dangerous, and

that by reason of the defective and unsafe condition of the locomotive and cars, and the high rate of speed, the car was thrown from the track and the injuries inflicted. That said Augustine Clark died on the 23d day of February, 1888, more than a year and a day after the date of the injuries, that he left surviving him a widow and minor children; that he was about forty-two years old and in the enjoyment of health; had previous to his injuries been a builder and contractor, had been doing a large and profitable business, and earning by labor, skill and experience, as a contractor, builder and superintendent of laborers, the sum of five thousand dollars per annum, and that previous to the date of the injury and death he had resided with his family, who survived him, and that prior to his said injuries, from his earnings, he had maintained, supported and cared for them, and superintended the education and attended to the welfare of his children, for which damages in the sum of ten thousand dollars are claimed. Printed record, pages 1 to 3, inclusive.

The defendant filed a demurrer to the complaint, page 3, which was overruled by the court, to which ruling of the court the defendant excepted page 4. The defendant thereupon filed its answer, denying specifically, each and every, the allegations of the complaint. Pages 4 to 6, inclusive.

On the 2d day of July, 1890, the case was triep before a jury, and on the 3d day of July a verdict rendered in the sum of nine thousand dollars, page 7. The defendant moved the court for a new trial, assigning as causes the admission of testimony, the giving and refusing of instructions set out in the record, and

that the verdict of the jury was contrary to law and not sustained by sufficient evidence, which motion was overruled by the court, page 15. The defendant further moved in arrest of judgment, assigning the insufficiency of the complaint, page 15, which motion was overruled by the court, to which ruling the defendant excepted, page 16. Final judgment was rendered on the 17th day of July, 1890, for the amount of the verdict with interest.

A writ of error was prayed to this court, which was allowed upon the filing of bond in the sum of twelve thousand dollars, with surety to be approved by the court, which was done.

In addition to the question of law raised upon the sufficiency of the complaint, two questions of evidence were properly reserved upon the trial, as shown by bill of exceptions No. 1, p. 7; also certain questions upon instructions, shown in bill of exceptions No. 2, p. 9.

SPECIFICATION OF ERRORS.

The errors assigned, and which are relied upon here, are as follows:

1. Error of the court below in overruling the demurrer of the plaintiff in error to the declaration or complaint of the defendant in error. In discussing the complaint, section 284 of the Revised Statutes of Indiana, will be under construction, and we therefore set the same out as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, if he lived, against the latter for the injury, for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

2. Error of the court below in permitting irrelevant and improper testimony to go to the jury, as shown in bill of exceptions No. 1, in the record.

Under this specification we present only one question.

As to the relevancy and competency of the testimony of George Clarke, Executor, who testified as a witness to the amount of the income of the deceased Augustine Clarke. The testimony upon this subject is shown in the record, page 8, and is as follows:

Q. About how much was Augustine Clark making in his business at the time of this accident—about how much per year was his business?

Objected to by counsel for defendant as incompetent, irrelevant and immaterial. The court overruled the objection; to which ruling the defendant, by counsel, then and there duly excepted.

A. We were doing a very profitable business. I suppose our profits over and above our living expenses would run from four to seven thousand dollors a year.

Q. Over and above living expenses, you mean?

A. Yes, sir.

Q. That is, after each partner had taken out support for his family.

A. Yes, sir.

Q. About how much was Augustine drawing for his family from the firm—about how much a year?

A. I used to keep the books. I was the book-keeper, and all charges came through me, and all moneys that he drew from the firm came through me. His yearly expenditures averaged from 13 to 15 and 16 hundred dollars a year. He used to draw that much from the firm.

Q. Then the profits you speak of were over and above that?

A. Yes, sir.

Q. He had his share in those profits?

A. Yes, sir.

Q. Making his whole income from the firm about how much?

A. His whole income from the firm was about three or four thousand dollars a year.

Motion to reject this testimony was also overruled and exception reserved, bill of exceptions No. 1, p. 8.

3. Error of court below in refusing to instruct the jury as requested by the plaintiff in error and shown in bill of exceptions No. 2, pp. 10 and 11.

Instruction numbers two, three, four and six are as follows:

No. 2. The railroad company, as a common carrier, is bound to exercise the highest degree of care

and skill in the operation of railroads in the transportation of its passengers, and any failure to do so, if injury resulted therefrom, would be deemed a wrongful act within the meaning of the law under which this action is brought; but the railroad company is not liable for injuries resulting from unavoidable accident, against which the exercise of the highest degree of prudence and foresight usually and practically employed in the management of railroads could not provide, and if the accident involved in this suit was of that character the railroad company is not liable in this action.

No. 3. The obligation which the law imposes upon railroad companies as common carriers, is to employ the utmost skill and prudence in the management of its road, as usually applied, in procuring for and operating its road with the best improved machinery, rolling-stock and appliances, and if such care has been exercised in the case under consideration, and, notwithstanding such exercise of care and prudence, the accident occurred by which the death of the decedent was caused, the railroad company is not liable, and your verdict should be for the defendant.

No. 4. If the jury shall find that the defendant in this case exercised the highest degree of such skill, prudence and foresight as usually applied in the management of railroads under like circumstances and conditions as the defendant railroad, the defendant is not liable under this statute, although the jury should find that the death of Augustine Clark, whom the plaintiff represents as executor, was caused by an injury received on defendant's railroad.

No. 6. If the jury shall find that the accident by which the injury to the decedent occurred was caused by an obstruction on the track, it is not incumbent upon the defendant to show that any such obstruction upon the track was placed upon the track without the agency of the defendant. The defendant is bound to show only such inspection of the track as is consistent with the highest degree of such prudence and skill as is usually and practically applied to the management of railroads under like circumstances and conditions as the defendant railway.

Specification No. 4. Error of the court in refusing to give to the jury, as requested, instruction numbers eight and five, tendered by the plaintiff in error. Said instructions eight and five are as follows, p. 12:

No. 8. The measure of damages, if the jury should find for the plaintiff, can only be such pecuniary loss and damage as the widow and heirs-at-law of the decedent may have suffered on account of his death. No other kind of damage is recoverable in this form of action.

No. 5. If the jury shall find that the death of Augustine Clark occurred more than a year and a day after his injury complained of herein, it is the legal presumption that the death of Augustine Clark was not caused by the injury complained of, and the jury will find for the defendant.

5 Error of the court in giving to the jury instructions of its own motion set out in bill of exceptions No. 2. The said instructions given by the court of its own motion are as follows, p. 13:

INSTRUCTIONS GIVEN BY THE JUDGE OF HIS OWN MOTION.

This is an action by the plaintiff, as executor, for the death of the testator, and is prosecuted under the statute of the State for the benefit of the widow and children of the deceased. The statute reads as follows, (Rev. Stat. 1881, Sec. 284):

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for the same act or omission. This action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

It is admitted that the deceased was a passenger on the defendant's road, and that in the derailment and overturning of the train upon which he was riding he received severe injuries, and afterwards, and after the lapse of more than a year, he died. It is not admitted, though hardly disputed by counsel, that the injuries so received caused the death, and that is a question of fact for you. Unless the injuries so received were the the proximate cause of the death, the defendant is not liable in this action. I am asked to instruct you that unless the death occurred within a year and a day from the time of the injury the action is not maintainable, but I decline to so instruct. The question is whether the injury caused the death, and, while the lapse of time is proper to be considered in determining that question, it is not conclusive of it.

The more important question in this case is whether the injury suffered by the deceased was caused by the

negligence of the defendant. A railroad company or other common carrier of passengers does not warrant the safety of those carried, but to that end is bound to exercise the highest degree of skill and foresight reasonably possible and practicable, and any failure to employ such skill and foresight is negligence, which, if it causes injury, makes the carrier liable.

This degree of care is required in respect to every consideration affecting or likely to affect the result—that is to say, in the case of a railway company, in respect to the condition of its road bed and tracks, as well as of its engines and cars, including their construction and repair, the manner of inspecting, caring for, &c., and also to the manner of running and the speed of trains.

Latent or concealed defects in machinery, rails, or road-bed, which could not have been discovered by reasonable care in the manufacture or construction, or by proper inspection, the carrier is not responsible for, and if in this case you find that the accident resulted from such a cause the defendant is not liable.

The accident having happened, and the death of the passenger having resulted (if you shall so find), it is incumbent on the defendant to show to your satisfaction that it was free from blame in the premises—that is, that the accident was produced by causes against which they could not, by the exercise of the highest practicable and reasonable skill, have successfully guarded.

If the accident was caused solely by the dropping of the brace-bar of the cow-catcher, and that occurred without negligence in the construction, repair and in-

spection of the engine in that particular, and without fault in inspecting the track at a reasonable time before the passage of the train, then the defendant is not liable; but counsel for the plaintiff insist that at and near the place of the accident the road-bed, ties and track were defective and out of repair in important respects, and that these defects caused, or in large degree contributed to, the accident and injury, and, if this was so, the company is liable.

If you should find for the plaintiff, you will then consider what damages should be awarded. On this subject I am asked to instruct that you can allow only for such pecuniary loss and damages as the widow and heirs-at-law of the decedant may have suffered on account of his death.

Some years ago, in a case in this court involving this question, I instructed that the jury was not restricted in its award of damage to the proof of pecuniary loss suffered by the widow or next of kin, for whose benefit the action was prosecuted, and, if left to myself, should so rule now. The statute provides that the damages awarded shall be distributed in the same manner as personal property of the deceased, and this, it seems to me, is inconsistent with the proposition that the damages to be allowed cannot exceed the proven pecuniary loss. Some of the next of kin might be dependent and shown to have a pecuniary interest in the life of the deceased, and others to have no such interest, and yet the damages allowed must go to those who had no such interest as well, and as much as to those on account of whose interest it was allowable. But the Supreme Court of the State, in a somewhat

recent case, as I understand, has put an interpretation upon this statute which is binding upon this and other courts, and in accordance with that decision, as I remember it, I instruct you, and for the purposes of this case you will accept it as the law, that you will allow only the pecuniary loss suffered by the widow and surviving children, on account of this death, not exceeding the limit of ten thousand dollars fixed by the statute.

Specification No. 6. Error of the court in overruling the motion of plaintiff in error in arrest of judgment, p 15 and 16, and in entering judgment for the defendant in error, p 17.

BRIEF.

I.

THE COMPLAINT.

The question presented upon the demurrer to the declaration or complaint, as well as in the motion in arrest of judgment, is whether an action of this character can be maintained for the death of a party where the death does not occur within the period of a year and a day after the injury.

This question was presented at length to the court below upon briefs by Judge Humphrey and Mr Snow, who then represented the plaintiff in error, and through their courtesy we have availed ourselves of the use of their briefs by incorporating them into our argument here.

We submit that the complaint does not state a cause of action, because it appears from the face of the complaint, that Augustine Clark lived more than a year and a day from the time he was injured.

At common law it is undoudtedly the rule that if one person injured another and the injured person lived for a year and a day from the time of the stroke, he was conclusively presumed not to have died of that injury. The question in this case is as to whether that rule applies here. That the rule is one that is not applicable alone in England could be shown by a multitude of authorities. These authorities would also show the reason

of the rule. There is some diversity as to whether it is necessary in an indictment for murder or manslaughter to show that the person alleged to have been killed, died within a year and a day; some of the authorities holding that it is necessary for the indictment to show this; and others holding that it is a rule of evidence, and that the facts may come out on the trial; but whether it is necessary to allege it in the indictment, or whether it is sufficient merely to establish it by evidence, is not material. The rule is the same in both cases. And the complaint here makes the allegation that the person injured did not die within a year and a day; and having so made it the question arises at once upon the complaint.

In *State v. Oreill*, I. Deveraux, North Carolina, 126, it is said in discussing what is requisite in an indictment:

"Nor is it less important to state the time of the death in order to show that the deceased died of the wound given her by by the prisoner within a year and a day after she received it; for if the death happened beyond that time, the law would presume that it proceeded from some other cause than the wound."

It will be perceived thus that the reason for the rule is the presumption that if the person lives so much as a year and a day, it cannot be said that he died of the injury.

Where the rule is considered one of evidence, the same thing is implied. Thus, in the case of *People v. Kelly*, 6 Cal., 212, it is said that it must appear that the death happened within a year and a day from the commission of the assault or inflicting of the wound, in order to hold the accused as the cause of the death.

In *People v. Murphy*, 39 Cal., it is said:

"It is objected to this indictment that it does not state the particular circumstances necessary to constitute the offense charged, and the particulars specified in the exceptions are that it does not specify the means by which the death was occasioned, and that the deceased died within a year and a day after the stroke was received, or the cause of death administered. The sufficiency of an indictment is not to be tested by the rules of the common law, but by the requirements of the criminal Practice Act of this State. That act provides that the particular circumstances need not be stated unless they are necessary to constitute the offense charged. Murder is the unlawful killing of a human being with malice aforethought, and certainly the means by which the killing is accomplished can never become material in ascertaining the offense charged. The requirement that it must appear that the party died within a year and a day is a rule of evidence merely. Unless the party dies within that time, the prosecution will not be permitted to show that he died of the injuries received."

This is no more than saying tnat it will be conclusively presumed that this was not the cause of his death. That any wrongful act which is alleged against the accused as causing the death, is disproved by the fact that the person injured lived a year and a day.

There are also two cases in Nevada upon this subject.

In *Nevada v. Anderson*, 4 Nev., 274, the court said:

"If we mean to convey the idea that a party received a wound of which he will die we do not say that he is killed, but that he is mortally wounded. If the allegation only means that Slocum died on the 5th day of May from the effects of a pistol shot previously fired, we see no reason why this should make the indictment defective. If the shot was fired more than a year and a day before the death, then the law would presume that the party died from some other cause than the wound. No proof of a

shooting which took place more than a year and a day before the death of the party would be received, and of course the prisoner could not be in any danger from that source."

In *State v. Huff*, 11 Nev., 20, the reason of the rule is more fully given.

The court says:

"Section 1863 of the compiled laws shows that the allegation as to the precise time when the offense was committed is treated as a mere formal allegation, except when time is a material ingredient of the offense. This is conceded by counsel, but it is argued that time is a material ingredient of murder, and the language of section 2329 of the compiled laws is relied upon in support of the proposition. In order to make the killing either murder or manslaughter it is requisite that the party die within a year and a day after the stroke received or cause of death administered. The literal import of this language does lend some countenance to the notion that the law is guilty of the absurdity of saying that a malicious killing shall be deemed a harmless or guilty act, according to the length of time the victim survives after receiving the fatal wound. But knowing what the rule of law which the statute recognizes and confirms has always been, we are able to acquit it of such absurdity. It is a rule of evidence merely. Knowing that the real cause of death must be more or less doubtful in all cases where the wound has not proved speedily fatal, the law has wisely set a limit to that inquiry and has determined when the wounded party survived the wound a year and a day, there shall be a conclusive presumption that he died from some other cause. It does not say: Notwithstanding you killed him with malice aforethought, you are deemed innocent, because he lived a year and a day after you stabbed him. But what it does say is: He lived so long after you stabbed him, I therefore conclude you did not kill him, or rather it is so doubtful in such cases what was the cause of death, that on the grounds of public policy, I have determined never to permit an attempt to show that the wound was the cause."

In discussing this question, in 3d Coke Institutes, 53, it is said, under the heading of "Within a Year and a Day":

"How this year and day shall be accounted is to be seen. If the stroke or poison, etc., be given the first day of January, the year shall end the last day of December, for though the stroke or poison, etc., were given in the afternoon of the first day of January, yet that shall be accounted a whole day; for regularly the law maketh no fraction of a day, and a day was added that there might be a whole year at least after the stroke or poison, etc.; for if he die after that time it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life, a rule of law ought to be certain."

At common law there was no strictly civil action for the death of a person. By common law, we mean modern common law. Whether the rule as to a year and a day obtained in strictly civil proceedings at common law, cannot be ascertained, because there was no such thing as a strictly civil proceeding. But it can be proved that at common law the presumption following the survival for a year and a day, that the person so surviving did not die of the injury received, obtained in every sort of proceeding; and in every sort of inquiry which could be instituted in reference to the cause of death. At common law there were three occasions upon which the courts inquired in respect of the killing of a human being.

First: Indictments which were public prosecutions; prosecutions brought in the name and behalf of the king.

Second: Appeals of death, which were proceedings brought not by the king nor in his name, but in the name and for the benefit of private individuals.

Third: Inquisitions against deodands.

Now, taking these in their order:

Where there was a public prosecution, that is, a prosecution brought in the name of the king, against one accused of a wrongful act, causing the death of another, it was necessary to show that the stroke or poison given by the accused had been given within a year and a day from the time of the death of the person alleged to have been slain As Coke says: the rule of law in case of life ought to be certain; and if a person stricken live more than a year and a day, as it could not be discerned of what he died, the law presumed that he died of something else than the stroke. This rule of law was undubitably settled, and is as well settled in America as it is in England.

In Hawkins Pleas of the Crown, Book No. 1, Chapter No. 13, the author says that he will examine into what cases a man may be said to kill another. In section No. 9 he says:

"Also it is agreed that no person shall be adjudged by any act whatever to kill another, who does not die by it within a year and a day thereafter; in computation whereof, the whole day on which the hurt was done shall be reckoned first."

So that when Hawkins comes to examine the question that is here presented for examination, viz.: in what cases a man may be said to kill another, or in the language of the statute now under consideration, in what case the death of a man shall be said to have been caused by the wrongful act or neglect of another, the first rule is, that the person shall not be adjudged by any act whatever to kill another, or, by his wrongful act or neglect, to have caused the death of another,

who does not die of it within a year and a day thereafter.

The second case in which the cause of the death of a person could be inquired into was in Common Law appeals of death. These Appeals of Death, as will be seen by reference to 4th Blackstone Com. p. 313, were merely the survival of the Saxon Weirgield. By the custom of the Saxons, compensation in money was rendered for the death of an individual. Surviving that custom came these Appeals of Death, which were private proceedings set on foot by persons interested in the life of the person who had been slain; and were brought not for the benefit of the public, nor in its interest, nor under its control, but solely for the benefit and under the control of certain persons bearing a near relation to the one slain. These proceedings were entirely independent of the public; so independent that if one man had killed another and had been indicted for the killing and acquitted, there could still be an appeal of death brought against him by the relative of the slain, and he could not plead as against such an appeal of death his former acquittal. Moreover, if an appeal of death had been brought and judgment had, the king could not pardon. Blackstone states this very strongly. He says he can no more pardon than he can release a judgment for damages in an action for trespass. See 4th Blackstone Com. p. 316. It was, however, entirely within the power of the person who brought the appeal of death to enter satisfaction of judgment for any reason which seemed to him fit; and therefore a pecuniary compensation could in this way be coerced and was so coerced.

Now in reference to these appeals of death, which, though criminal in form, were civil in purpose, being between private individuals and under the control of private individuals, two rules are to be observed as laid down at common law; first, they could not be brought more than a year and a day after the death. That was a statute of limitations upon the appeal of death, just as two years in the Indiana statutes is a limitation upon an action for causing the death of a person.

This limit was fixed by 3 Henry VII, chap. 1, and was a revival of the Saxon limitation. But there was not only this limitation against this action of appeal of death; there was also a presumption in regard to the year and a day elapsing between the stroke and the death. This distinction is to be carefully observed. The limitation of a year and a day began from the death —that is, no appeal of death could be brought more than a year and a day after the death happened. There was no such limitation upon an indictment by the king or upon a public prosecution, but upon this private proceeding for the benefit of the family of the person slain, a limitation in accordance with the Saxon custom was set for a year and a day. In this way, again, the proceeding by the individual was different from the proceeding by the Crown. But the presumption as to what had been the cause of the death was the same in the private proceeding of an appeal of death and the public prosecution by the king under an indictment. As bearing directly on this question we set out the following copy of the statute 6 Edward I., Chapter 9:

"The King commandeth that no writ shall be granted out of the Chancery for the Death of a Man to enquire whether a

man did kill another by Misfortune or in his own Defence or in other Manner without Felony, but he shall be put in Prison until the coming of the Justices in Eyre or Justices assigned to the Goal-delivery and shall put himself upon the country before them for Good and Evil. In case it be found by the country that he did it in his Defence or by Misfortune, then by the Report of the Justices to the King the King shall take him to his Grace if it please him. It is provided also that no appeal shall be abated so soon as they have been heretofore, but if the appellor declare the Deed, the Year, the Day, the Hour, the Time of the King and the Town where the Deed was done, and with what weapon he was slain, the Appeal shall stand in effect and shall not be abated for Default of fresh Suit if the Party shall sue within the Year and the Day after the Deed was done."

Also the following Chapter of a Statute 3 Henry VII., Chapter 1:

"Item. The King remembering how murders and slaying of his subjects daily do increase in this land, the occasions whereof be divers, one, That men in towns where such murders hap to fall and be done will not attach the murderer where the law of the land is That if any Man be slain in the day and the felon not taken, the township where the death or murder is done shall be amerced, and if any man be wounded in peril of death the party that so wounded should be arrested and put in surety till perfect knowledge be had whether he so hurt should live or die, and the Coroner, upon the view of the body dead, shall inquire of him or them that had done that death or murder, of their abettors and consenters, and who were present when the death or murder was done, whether man or woman, and the names of them that were present, and so found to enroll and certify which law by negligence is disused and thereby great boldness is given to slayers and murderers, and over this it is used that within the year and a day after any death or murder had or done the felony should not be determined at the King's suit, for saving of the party's suit, wherein the party is oftentimes slow and also agreed with, and by the end of the year all is forgotten, which is another occasion of murder, and also he that will sue any appeal must sue in proper

person, which suit is long and costly, that it maketh the party appellant weary to sue. For reformation of the premises the King, our sovereign lord, by the assent of the Lords, spiritual and temporal, and the Commons in the said Parliament assembled and by authority of the same, will that every Coroner exercise and do his office according to law as is afore rehearsed, and that if any man be slain or murdered and thereof the slayers, murderers, abetters, maintainers and comforters of the same be indicted, that the same slayers and murderers and all other accessories of the same be arraigned and detained of the same felony and murder at any time of the King's suit within the year after the same felony and murder done and not tarry the year and day for any appeal to be taken for the same felony and murder, and if it happen any person named as principal or accessory to be acquitted of any such murder at the King's suit within the year and day, that then the same Justices afore whom he is acquitted shall not suffer him to go at large, but either to remit him again to the prison or else let him to bail, after their discretion, till that year and day be passed, and if it fortune the same felons or murderers and accessories so arraigned, or any of them, to be acquit or the principal of the said felony to be attaint, the wife or next heir of him so slain, as (the case) shall require, may take and have their appeal of the same death and murder within the year and day after the same felony and murder done against the said persons so arraigned and acquit and all other their accessories or against the accessories of the said principal or any of them so attainted, or against the said principals so attainted, if they be on live, and the benefit of his clergy thereof before not had, and that the appellant have such and like advantage as if the said acquittal or attainder had not been the said acquittal or attainder, notwithstanding and over that the wife or heir of the said person so slain or murdered, as the case shall require, may commence their appeal in proper form at any time within the year after the felony done before the Sheriff and Coroners of the county where the said felony or murder was done or before the King in his bench and Justices of goal-delivery, and the appellant in any appeals of murder or death of man, where battail by the course of the com-

mon law lieth not, may make their attornies and appear by the same in the said appeals after they be commenced to the end of the suit and execution of the same."

We insist that these statutes bear out the argument that at the common law the Year and the Day was considered in two aspects: First, as a statute of limitations against the appeal of the individual and not to be confounded with, secondly, the presumption of law that the death must ensue within a year and day in order that it may be alleged that the hurt was the cause of the death; and that they further bear out the proposition that at the common law the appeal of murder at the suit of the private individual was not a public prosecution, but one which did not bar a public prosecution nor to be barred by it.

In Hawkin's Pleas of the Crown, book No. 2, chapt. 23, section No. 88, we read:

"Also it seems clear that the appeal of death must not only set forth the day when the hurt was given, but also the day when the party died of it; as it appears from all precedents of this kind, both in Coke and Rastal; and also from the manifest reason of the thing; that it may appear that the party died within a year and a day after the stroke in which case only the law intends the death was occasioned by it."

Here then we see that at common law the only private proceeding that could be taken by an individual against one who had caused the death of relative, had applied to it this presumption of the cause or causans of death in exactly the same way that it was applied in the case of public prosecution or indictment procured by the Crown. There was a statute of limitation upon the appeal of death of a year and a day; but no such limitation was placed upon indictment. And when the

court came to consider what was the cause of death, both in public prosecutions and private proceedings it applied the same rule, to-wit: that if the party injured did not die within a year and a day after the stroke, the law would not intend that death was occasioned by the stroke.

So that we see that at common law in an appeal of death which was allowed for private purposes and set on foot by the relatives of the injured person in very much the same order and degree as under Lord Campbell's act and the statute of Indiana, an action is allowed to be brought against one who by his wrongful act, or neglect, causes the death of another; and which was a mere survival of the Saxon Weirgield, a proceeding compensatory in its nature; and in ascertaining whether or not death has been caused by a stroke, was applied this rule of a year and a day.

The third instance at which, at common law, an inquisition could be set on foot, by reason of the death of an individual was in case of a deodand. At common law if the death of a person was caused by an inanimate object the inanimate object was a deodand, and was seized for the benefit of the Crown and sold for pious uses. Now, what was the rule in reference to the deodand?

In first Hawkin's Pleas of the Crown, book No. 1, chapter No. 8, section No. 7, it is said in regard to the presumption and rule of law as to inanimate objects causing the death of a human being:

"In all these cases if the party wounded, die not of the wound within a year and a day after he received it, there shall be nothing forfeited; for the law does not look upon such a wound

as the cause of a man's death, after which he lives so long; but if this party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever, in the meantime."

At the same place, in section No. 4, he says:

"The law does not ground the forfeiture on any default in the things forfeited since it extends it to things without life, to which it is plain that no manner of fault can be imputed."

We quote this last sentence as showing that the reason for the year and a day rule was not at all based upon mercy to the accused, but was an effort of the common law to fix some rule for ascertaining cause or causans of so uncertain an event as the termination of a human life. We therefore ask the court's especial attention to the fact that Hawkins, after laying down this presumption in respect to a year and a day, applied in favor of deodands, expressly says that the law does not ground the forfeiture of the deodand on any fault in the deodand; since the deodand is a thing without life. Therefore the rule was not grounded upon mercy to the accused, either in an indictment or appeal of death, because it equally applied to inanimate objects, to-wit: the deodands. This rule in reference to a deodand was enforced in the case of Regina vs. Brownlow, reported 3, P. & D. 52; 11, A. & E., 119; 8, D. P. C., 157; 4, Jurist 103.

In that case a steam boiler had exploded and killed a man. An effort was made to forfeit the boiler as the deodand, but the court quashed the whole proceedings, because they had failed to show that the person who was injured by the explosion had died within a year and a day of the time of the explosion. This was sometime in the present century, about 1830.

It will thus be seen that every application of this rule of a year and a day, was made at common law, which was possible. The reason and policy of applying this rule to the statute allowing an action for causing death by a wrongful act or neglect is obvious, and we do not know where it is better illustrated than in the case of Hanna vs. Jeffersonville R. R. Co., 32 Indiana, 113. That case is taken up in a discussion as to whether the two year's limitation fixed in this statute begins to run from the death of a person injured or the qualification of his administrator. The court held that it began to run from the death. The ground upon which the court put that adjudication was that the widow and children could procure administration as and when they wished. The court said:

"The statnte was intended mainly to be operative against carriers of passengers and in a very large measure against corporations, whose duties are exclusively performed by hired servants, who are being constantly changed, and in whose knowledge the facts in such cases, would generally rest, or who are to be depended upon for such information as would lead to a discovery of the facts and witnesses to establish them. The reason for requiring a suit to be brought within some short period after the occurrence were therefore very forcible and must have been perceived. While a proper regard for the security of human life required that a right of action should be given which did not exist by previous law, the consideration already noted required that the remedy should be promptly sought, else a door would be open wide for injustice and wrong."

Now apply this reasoning to the contention we are at present making in regard to the proper construction of this statute as being controlled by the common law presumption. If this presumption does not obtain then the cause of action is sustained indefinitely. A man

may be injured to-day and not die for 21 years. Physicians may readily be found who will trace his death to a cause happening twenty years before his death. Nothing is more uncertain than the cause which puts an end to human life. Nothing is less accurately known than the reason or causans of death. The science of medicine, while it has made tremendous strides during the centuries during which it has been prosecuted, yet it is far from being an exact science. So many causes contribute towards this most important of all results to a human being, that it is next to impossible, except in a few instances, to say what was the real cause. The longer death is delayed after any accident has happened the more difficult it is to tell how much influence the accident has had upon the duration of the life of the person hurt. The common law, recognizing this, wisely held that if a person injured lived as long as a year and a day after the injury, that it was impossible to say of the hurt that it caused the death. So many causes could come in, add to, aid or supplement the injury done, that the law wisely held it impossible to predicate any longer of the hurt that it was the cause of death. The presumption is a reasonable one, and has stood in the common law for centuries There is nothing whatsoever in the statute or decisions of Indiana, to show that it does not exist now. We suppose beyond doubt that the courts in Indiana would hold it, and do hold every day, as applicable in the trial of indictments. There is no reason, if applied there, why it should not be applied to actions under this statute, and to hold it not applicable, would be to say that at the criminal forum the law would refuse to hold that

death had been caused by a wrongful act; indeed, would conclusively presume it had not been caused by the wrongful act, whereas, at another forum it would hold that death had been caused by the same wrongful act. We do not believe that any such anomaly exists in law, and we believe that looking at the reason and policy of this act; at its history and at the reason and policy of this presumption as a presumption which is indulged in, not in mercy toward the accused, but in an effort to ascertain with reasonable certainty what is the cause of a fixed event, that it should be applied by this court in construction of the statute at bar.

We have thus shown that the rule of the law, which we claim is applicable here, is applicable to every case known at common law, where a civil remedy, or a quasi-civil remedy was given against a person who had committed the crime of killing another—that is, who had committed the crime of murder or manslaughter.

We shall endeavor to show that the statute of Indiana, Sec. 284, Revision of 1881, upon which this action is brought, furnishes a civil remedy for a like criminal offense.

If we shall prove this to the satisfaction of the court, we claim that it follows inevitably that the law must apply the same rule to the civil action as to the criminal prosecution, or be guilty of the grossest absurdity.

The statute of Indiana above referred to (Sec. 284) is said by the Supreme Court of Indiana to have been "intended to accomplish the same end as the statutes

9 and 10 Vict. C. 93, commonly known as Lord Campbell's Act." *Mayhew* v. *Burns*, 103 Ind. 328.

The text of Lord Campell's Act, which was passed Aug. 26, 1846, so far as it relates to the matter in hand, is as follows:

"Cap. XCLII. 9 & 10 Vict. An act for compensating the Families of Persons killed by Accidents. (26 Aug. 1846.)

"Whereas, no action at law is now maintainable against a Person who by his wrongful Act, Neglect or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the injury so caused by him: Be it therefore enacted," &c., "That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default and the Act, Neglect or Default is such as would (if Death had not ensued) have entitled the party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such circumstances as amount in Law to Felony.

"II. And be it enacted, That every such action shall be for the Benefit of the Wife, Husband, Parent and Child of the Person whose Death shall have been so caused, and shall be brought by and in the name of the Executor or Administrator of the Person deceased: and in every such Action, the Jury may give such damages as they think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought: and the amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided among the before-mentioned Parties in such shares as the Jury by their Verdict shall find and direct.

III. Provided, always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of complaint, and that every such Action shall be com-

menced within Twelve Calendar Months after the Death of such deceased Person."

The fourth section requires a particular statement of the claim to be filed with the declaration.

The fifth section enlarges the construction of the word "person," and words denoting number, gender, relationship, &c.

"VI. And be it enacted, That this Act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that part of the United Kingdom called Scotland."

The seventh section relates to amendment and repeal. [For copy of this act as well as copies of the acts of all the States see Harris Damages Corporations Appendix.]

What, then, was the end "which this statute was intended to accomplish?"

An examinution of the statute shows that it was intended to make the "*wrongdoer*," "who by his wrongful act, neglect, or default, may have caused the death of another," "answerable in damages," "although the death shall have been caused under such circumstances as amount in law to felony—"that is, although the homicide were actual murder or was committed by chance medley or in self-defense (Blackstone Comm. p. 95.)

It is to be considered that the common law appeals of death were abolished by statute in England in the year 1819, and that in the year 1808, it was decided by the case of *Baker* v. *Bolton*, I. Camp. N. P. 493, that no action lay at common law for an injury causing death, and that that case, though much criticized in England and America, and even denied as an authority

by many American courts, came to be recognized as fixing the law of England in this respect.

There was, therefore, in England, at the time of passing of Lord Campbell's Act, no civil remedy by the relations of a person killed by another against the slayer. Lord Campbell's Act had for its end and object, therefore, the revival of the ancient law relating to appeals of death in a modified form, and to insert into the common law a principle, the reverse of which had been declared to be the common law of England.

Lord Campbell's Act gave a *new* cause of action, namely, *for causing the death.* It continued the right of action which the deceased had in favor of his relatives only in the sense that it gave them a right of action for *any* injury arising from the wrongful act, default or neglect. It did not give them a right of action for *the* injury which the *deceased* sustained, and for which he might have recovered damages, had he lived, but for the injury which *they* suffered by the *death* of the deceased. And this loss must be a pecuniary loss to the person claiming as beneficiary. *Franklin v. Southeastern R. Co.*, 3 H. & N. 211 ; *Blake v. Midland*, 182 B., 93 ; *Pym v. Great Northern R. Co.*, 4 Best & Sim, 396.

The interpretation placed upon Lord Campbell's Act by the English Courts is that the right of action for the benefit of the relatives is conditional—that, if the deceased might have sued for the injury to *him*, they, after his death, may sue for the injury to them. Hence, if he has compromised and settled *his* right of action, *their* right of action falls thereby. (*Read v. Great Eastern Rwy. Co.*, L. R. 3, O. B. 555). Also, if

his misconduct or negligence contributed to the wrongful or negligent act of the defendant to produce the injury to the deceased, inasmuch as *he* would have had no right of action, *they* have no right of action. *Senior v. Ward*, 1 Ellis & Ellis, 385.

The right of action under Lord Campbell's Act is a *new* right of action, *conditional* upon the deceased having had a right of action for *his* injury.

The new right of action is for the pecuniary injury to the relatives *caused by the death* of the person deceased.

It is, therefore, a right of action exactly similar to that which the relatives had at common law by appeals of death, that is, a civil remedy for the criminal offense.

If there be any doubt of this last proposition, there are other circumstances connected with Lord Campbell's Act which prove this proposition.

It appears by the reported speeches of the authors and promoters of Lord Campbell's Act that the object of the bill was to assimilate and introdnce into the law of England the doctrines of the law of Scotland in respect to the right of action referred to in Lord Campbell's Act.

The debate on the bill, reported in Hansard's Parliamentary debates, Vol. 87, pages 1360 to 1380, shows this. The Attorney General said: "A great reason given for the introduction of this measure was the manner in which the law on this subject had worked in Scotland." Mr. Wakley (page 1372) proposed a select commission to consider the bill with a view to assimilating the law of England and Scotland.

By the 6th section of Lord Campbell's Act, it was enacted that "Nothing contained therein shall apply to that part of the United Kingdom called Scotland," plainly because they did not wish, by that statute, to disturb the fundamental doctrines of the Scotch law for the purpose of introducing a statutory action.

The Scotch law fully provided for this case, and the English statute could add nothing to the law of Scotland, except by repealing the ancient common law doctrines of Scotland.

It being evident that the statute and the Scotch law are very nearly similar on this subject, let us examine the Scotch law in order thereby the better to understand the object and meaning of the statute.

The corresponding doctrine in the Scotch law is called "Assythment." and it combines in itself two meanings, one almost exactly corresponding to the common law "appeal of death," and the other the doctrine which is stated to exist by virtue of the common law of Scotland, namely, that there is a remedy in favor of the relatives for any injury, including death, produced by criminal act.

The case of *Lady Leithhall and her children v. Earl Fife*, Donatar of Escheats, as reported in the Dictionary of Decisions, Vols. 31 and 32, page 13904, which is reported in full in 2 Lord Hailes' Reports, shows clear y the two meanings of the wor l "Assythment" in the Scotch law.

The reports of the case in the Dictionary of Decisions is as follows:

"John Leith, of Leithhall, was murdered on the street of Aberdeen 22nd December, 1763, by James Abernethy, of Mayen,

who, having made his escape, a criminal prosecution was brought against him. He, having failed to appear, was declared a fugitive and outlaw. A gift of his escheat was procured for behoof of his wife and children; but with this proviso, that it shall be without prejudice to a claim of assythment by the wife and children of the deceased, if such claim be competent in law. An action was accordingly brought upon this claim, which was much controverted in the court, and the doubtfulness arose from mixing the two senses of the word "assythment," which occasioned much reasoning that was not applicable to the real case.

When the punishment of murder or of any other crime is inflicted, full satisfaction is understood to be given to the public and to the private party concerned, after which no vergilt or composition for slaughter, is due to the relations of the person slaughtered, such as would be due if the criminal were protected from punishment by the King's pardon. The King may pass from the atonement due to the public; but the private party concerned is entitled to have his resentment gratified either by condign punishment, or by a composition which in that case is styled assythment. In the present case there can be no claim for such assythment, because Mayen, the criminal, has got no pardon; on the contrary will suffer capital punishment if he be apprehended; and while this matter is uncertain, there can be no claim for assythment, for it would be absurd that a man should be liable to punishment even after paying a sum to free him from it.

But assythment, in a more general sense, means the reparation that is due to an innocent man who is hurt by a criminal act. In that sense, reparation or assythment is unquestionably due. If a man who is culpable only, be liable in damages, what doubt can there be of his being liable when the damages are occasioned by his being guilty of a flagrant crime.

The Court accordingly sanctioned the claim for assythment."

It appears, therefore, that the Scotch common law contained the one doctrine which was lacking in the English common law, namely, that reparation was due to the relations of a person who had been killed by

another for the injury sustained by them in his death, and that this doctrine was held in a case where the death was plainly under such circumstances as constituted a felony.

The Scotch law expressly allowed a civil remedy for the injury caused by the criminal act. Lord Campbell's Act inserted an exactly similar doctrine into the common law.

Further Lord Campbell's Act shows on its face that it gives a civil remedy for a criminal act. When death is "caused by wrongful act, neglect or default," such act, neglect or default being actionable in the person immediately injured thereby, this amounts either to murder or manslaughter in the person causing the death. Death by wrongful act may certainly be murder if accompanied by premeditation, and any killing by an actionable wrongful act, neglect or default, without premeditation, certainly falls within the definition of manslaughter given by Blackstone, "the unlawful killing of another without malice either express or implied; which may be voluntary, upon a sudden heat; or involuntary, but in the commission of some unlawful act," 4 Blackstone, 191. The expression "unlawful act," Blackstone defines on the next page (4 Bl. 192). He says: "So when a person does an act, lawful in itself, but in an unlawful manner and without due caution and circumspection" upon the well recognized principle that a lawful act done in an unlawful manner is, in contemplation of law, an unlawful act.

Lord Campbell himself says in *Regina v. Pocock*, 17 Q. B., 34, 38 (1851):

"No doubt the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter; and the cases which have been cited in the course of the argument establish that doctrine."

It is plain from the wording and structure of Lord Campbell's Act, that it was the intention to revive in a modified form the old law of weregilds and appeals of death.

Lord Campbell's act gave the pecuniary remedy to the same relations who would have been entitled to sue in the case of appeals of death, and the same time of limitation was fixed as the time within which the action must be brought. Appeals of felony are thus described by Blackstone:

"An appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done in an inferior one, which is the general use of the word; but it here means an original suit, at the time of its first commencement. An appeal, therefore, when spoken of as a criminal prosecution, denotes an accuation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offense againt the public. * * *

"This private process for the punishment of public crimes, had probably its origin in those times ,when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offenses. * * * And thus we find in our Saxon laws (particularly those of King Athelstun) the several weregilds for homicide established in progressive order from the death of the ceorl or peasant, up to that of the king himself. And in the laws of King Henry I. we have an account of what other offenses were then redeemable by weregild, and what were not so. As therefore during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that when these offenses by degrees grew no longer redeemable, the private pro-

cess was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offense. * * *

"The only crime against one's relations, for which an appeal can be brought, is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation; but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confirmed, by an ordinance of King Henry the First, to the four nearest degrees of blood. It is given to the wife on account of the loss of her husband; therefore, if she marries again, before or pending her appeal, it is lost and gone; or, if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was the next heir by course of the common law, at the time of the killing of the ancestor. But this rule has three exceptions: 1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal. 2. If there be no wife, and the heir be accused of the murder, the person, who, next to him, would have been heir male, shall bring the appeal: 3. If the wife kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edw. I., c. 9, all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party."

4 Blackstone, 313, 314.

It can not be that such similarity was unintentional. The reason for the abolition of appeals of death was, that they interfered with, and oftentimes delayed, the criminal prosecution, and amounted to a gratification of private resentment, rather than a punishment for the injury committed against the State. The principle of them, however, that there ought to be a remedy to the individual for the injury done him by the killing of a relative on whom he or she was dependent, was recognized as being a just and correct one. In passing the Statute of 9 and 10 Vict., chap. 93 (Lord Camp-

bell's Act), the legislature preserved nearly all the features of the old law relating to weregilds and appeals of death, except that the civil remedy was made independent of and in addition to the criminal prosecution, instead of being a substitute therefor.

We submit, therefore, that we have established the following propositions :

1. That in every case known to the common law where a civil or quasi-civil remedy was given to the relatives of a person killed by another, the presumption or rule of law that the death was not caused by the wrongful act, default or neglect, unless the death occurred within a year and a day after the infliction of the wound, applied as well to the civil action as to the criminal prosecution.

2. That Lord Campbell's Act gave a civil remedy to his relatives of a person killed, either under circumstances amounting to murder, or manslaughter, reviving in a modified form the old common law of weregilds and appeals of death, and changing the rule of common law relating to civil actions for injury causing death, as interpreted by the English courts.

We claim further that the interpretation placed upon the Indiana Statute (Sec. 284, Revision of 1881) by the Supreme Court is the same in all its parts as that which is claimed should be, and has been, put upon Lord Campbell's Act. As before stated, the Supreme Court of Indiana has stated that the Indiana Statute was intended to accomplish the same end as Lord Campbell's Act. (*Mayhew v. Burns* 103, Ind. 328.)

The construction which the Supreme Court of Indiana has given, is exactly similar to that which the En-

glish courts have given to Lord Campbell's Act. The Court says in the case of *Jeffersonville R. R. Co. v. Swayne Admr.* 26, Ind. 459, at pp. 484–486.

"The right of action referred to against the appellant, for causing the death of Swayne, did not exist at common law, but is based upon Section 784 of the code, which provides that" (here quoting the statute which is under discussion) "That a cause of action for an injury to the person dies with the party injured, and does not survive to his personal representative, is a maxim of the common law, too familiar and long established to require the citation of authority to support it. The statute does not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such the legal effect, but it creates a new cause of action unknown to the common law.

"The action given by the statute is for causing the death, by a wrongful act or omission, in a case where the deceased might have maintained an action had he lived, for an injury by the same act or omission. The right of compensation for the bodily injury of the deceased, which dies with him, remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit." * * *

In *Whitford v. The Panama R. R. Co.* 23, N. Y. 465, it was held, under a statute substantially the same as ours, that the compensation for bodily injury remains extinct, but a new grievance of a distinct nature, namely, "the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by the statute the subject of a new cause of action in favor of the surviving relatives, but to be prosecuted in point of form, by the executor or administrator." It was also held that the reference in the statute of that State, of which

ours, in that particular, is a copy, "to the ability of the deceased to maintain the action if death had not ensued, is inserted solely for the purpose of defining the kind and degree of delinquincy with which the defendant must be chargeable, in order to subject him to the action. The act, neglect, or default must be such as would, if death had not ensued, have entitled the party injured to maintain an action," &c. See also *Woodward v. Michigan &c. R. R. Co.*, 10 Ohio St. 121.

* * *

"Our statute creates a new cause of action for the exclusive benefit of the widow and children, or next of kin, not for the injury to the deceased, for which, had he lived, he might have sustained an action, but for causing his death, and thereby depriving those entitled thereto of his society and support, and it follows, as a legal consequence, that the damages assessed must be based on the injuries resulting from such death to the wife and children, or next of kin, for whose benefit the right of action is given."

In the case of *The Pittsburgh, Ft. Wayne & Chicago Rwy. Co. v. Vining's Admr.* 27 Ind, 513, the Supreme Court said:

"The provision that the personal representative may maintain an action, if the deceased could have maintained one, if the injury had not caused death, has been heretofore ruled to be applicable to the cause of action, and not to the person bringing it. In other words, an action may be maintained when the deceased, had he lived would not have been prevented from recovering by reason of his want of care."

In the case of *Mayhew v. Burns*, 103 Ind., 328, at page 329, the Court said:

"That it was the settled rule of the common law that the death of a human being could not be complained of as an injury in a Civil Court, is a proposition universally admitted both in England and in this country." Also on page 333 they say: The statute "gives to the widow or next of kin, through the personal

representative, a right to recover for any injury which they may have sustained by reason of the death of an adult, or one emancipated from parental service, and in whose life they may have had a pecuniary interest."

The case of *Lofton vs. Vogles' Admr.*, 17 Ind 105, is a case where, from the facts, it is evident that a civil remedy was sought for manslaughter. The defendant had actually been tried and convicted of manslaughter. The Supreme Court had granted a new trial (*Lofton vs. State*, 14 Ind., 1,) and evidently the criminal prosecution had not gone to final judgment when this suit was brought. The Court says:

"Another position taken is, that this civil suit cannot be maintained by the plaintiff without his first showing that he has criminally prosecuted the defendant to conviction; that such criminal prosecution is a condition precedent to a civil suit. This rule of the common law does not prevail in the United States. We do not here depend upon the injured party, or his representative, to institute criminal prosecutions. We have no *market overt* sales, by which stolen property is protected in the hands of a purchaser till the thief is convicted. We have no forfeiture of estate for felony, whereby the criminal is deprived of the means of satisfying a judgment in a civil action, should one be obtained."

This is placing the right of action given by this statute exactly upon the same ground as an action of trover brought against a person who has committed larceny—a civil remedy for a criminal offence.

Moreover, an examination of the words of the Indiana statute shows that it, like the English statute, expressly purports to give a civil remedy for a criminal offence. The words are: "When the death of one is caused by the wrongful act or omission of another," &c. Plainly such a killing *may* be murder. We claim that every killing under circumstances such that the person

deceased was not prevented by his own misconduct or negligence from recovering against the wrongdoer for his personal injury ("if the former might have maintained an action, had he lived, against the latter for the same act or omission") *must* be either murder or manslaughter.

The definition of manslaughter given in the Indiana statutes is the same as that given by Blackstone and above quoted, word for word.

"Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter, and, upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than two years." (Sec. 1908.)

It is therefore to have the same interpretation. The commission of an unlawful act may consist in the unlawful or negligent doing of a lawful act—a "wrongful omission" of duty. The only writer of Indiana criminal law—Moore—states this to be the law of Indiana. He says, speaking of this statute:

"At common law the involuntary killing of another in doing a lawful act which would probably produce such a consequence if done in a negligent or unlawful manner was manslaughter. A lawful act, done in an unlawful or negligent manner is, in law, an unlawful act." (Moore's Criminal Law, Indiana, 1878.)

We have been unable to find any reported case in Indiana establishing this construction of manslaughter, but it is evidently correct upon all the authorities.

If the above propositions are correct, it follows that the Indiana statute in question does give a civil remedy to the relatives of a person killed under cir-

cumstances amounting to either murder or manslaughter.

The civil remedy is given *for* the criminal offense and *because* the defendant has committed a criminal offense. If no criminal offense has been committed, there is no civil liability. The civil and criminal remedies are independent, but cannot be granted except upon proof of the same state of facts.

So far as the rule for which we contend is concerned, it must apply as well to the civil action as to the criminal prosecution, or the law will become open to the charge of contradicting itself.

Suppose a man, who has committed an assault upon and wounded another under circumstances showing premeditated malice, is, upon the death of the person assaulted, indicted for murder, and that the indictment shows on its face that the death did not occur till more than a year and a day after the assault. The prosecution fails, because the law says that the death could not have been caused by the assault.

Suppose that the administrator of the person assulted, on the same day that the indictment is found, brings a civil ac ion against the person committing the assault, claiming that the assault caused the death, and that the law should be interpreted as saying that there is nothing to prevent its being shown that the death was caused by the assult. It is easy to see that it might result that on the same state of facts the original prosecution would fail, because the law considered it the same as proved that the assault did not cause the death; and yet that the civil action might succeed be-

cause it had been proved that the assault did cause the death.

There certainly can be no reason for the establishment of such a diversity of construction. The law has established a rule for the ascertaining of the "proximate cause," and has fixed a limit beyond which inquiry shall cease. The limit is arbitrary, it must be admitted, but any limit as to time must be arbitrary. Such a limit is justifiable in the same manner as any statute of limitation. As there must be an end of strife, so there must be an end of the inquiry into the causes of causes When the cause of the cessation of human life is to be inquired into, inasmuch as life is a continuous fact, the cessation of it in middle life or old age, may in a sense, be caused by an injury received in infancy. An injury in infancy may have made a person, born in a state of health, a cripple, and, so far as human knowledge can see, his death, years afterwards, may have been caused by that act. But can the law go into any such inquiries? If it can make such inquiries when the death occurs a year and two days after the wound or other injury, why may not the relatives of the cripple say, at the age of thirty, by an assault, or by negligence of another, bring suit against the wrongdoer upon the death of the person injured at the age of fifty? It is plain that the inquiry in a case of this kind, as to the cause of death, might be endless. The person deceased might in the meantime have endured every kind of pain and suffering that flesh is heir to by reason of sickness or accident, and any conclusion that the jury might reach after such inquiry would be the result rather of guess work than inference.

The year and day rule is a reasonable one, founded upon principles of justice to the individual, and necessary to the orderly administration of trials. If it be not declared as the rule applicable to this class of actions, the duties of Courts and juries will be likely to be increased to an extent far beyond what has hitherto been required of them, by actions upon this statute for injuries received years ago. The fact that there is no case to be found where this question has been raised, argues that the year and a day rule has been taken as settled law, for the facts certainly have existed many times before this, and the question would certainly have been litigated, if there had been any hope of success.

There is nothing in the statutory limitation of two years to prevent the construction which we claim as being placed upon this statute. Two years from the *death* of the injured party is allowed within which the action must be brought. (*Hanna, Adm'r. v. Jeffersonville R. R. Co.*, 32 Ind., 113.)

Such a limitation is necessary in order that there may be an end of litigation. The year and day rule stands upon an entirely different ground, as above shown, absolutely placing a limit to to the inquiry into *causes of causes.* This limit operates from the time of the wrongful act or omission. The two years statute of limitation operates from the accruing of the cause of action, that is, from the *death.* The two limitations are, therefore, absolutely disconnected, and stand upon different and independent grounds.

For the above reasons we claim that the complaint, by the reason of its showing the death to have occurred more than a year and a day after the act, shows, in con-

templation of law, that the wrongful act or omission *did not cause death*, and that it is, therefore, insufficient by reason of the failure to allege the most important fact.

II.

EVIDENCE.

It appears from the testimony set out in bill of exceptions No. 1, p. 8, and printed in the specification of errors, that plaintiff was permitted to testify over the objection of the defendant as to the income of deceased previous to the time of his death. We concede that it would have been competent to have shown the plaintiff's intestate's ability and capacity for labor, as well as skill in the art in which he was employed, in order to show what he was capable of earning, but we submit that specific income for a particular period was not a competent fact to be proved. It was shown by the Carlisle tables that the expectancy of life of the deceased was in the neighborhood of 24 or 25 years. The income of the deceased for a single year was not accurate criterion for the future through a long period of years, and by increase of skill, knowledge, or fortune, his earning capacity might have increased, or, from want of health, or any of the many causes affecting the success of men, his earning capacity might have decreased

We concede that the authorities are not uniform upon this subject, but cite in support of our view, the case of the *East Tennessee, Virginia & Georgia R. R. v. White*, 5 Lea, 540, where the court says:

"The plaintiff was asked, on cross-examination, how much money he made the year previous to the injury. His counsel objected to the question and the objection was sustained. Upon

the question of damages it would have been competent to show the plaintiff's ability and capacity for labor, as well as his skill in any particular art or profession, in order to show that he was capable of earning, but what money he had in fact made the year previous was not pertinent, and not being strictly competent, the court was not in error for rejecting it."

III.

INSTRUCTIONS.

We have set out elsewhere in full, instructions given by the Court of its own motion, p. 13, and we call particular attention to that instruction where his Honor, in announcing to the jury the law of the case, expressly stated to them that he disapproved of the law as laid down by the Supreme Court of the State of Indiana. He stated to them that in a previous case, involving the same question, he had instructed that the jury was not restricted in its rule of damages to the proof of pecuniary loss suffered by the widow or next of kin, and that if left to himself he should so instruct now. Not only does the learned judge state this, but he goes further and makes an argument to the jury why he is right, and why the Supreme Court of Indiana is wrong, and it must be admitted that his argument is a strong one, if it were addressed to lawyers. The argument being that the language of the statute itself is inconsistent, in the opinion of his Honor, with the rule laid down by the Supreme Court of Indiana, that the damages to be allowed cannot exceed the proven pecuniary loss.

We are aware that in the Federal Courts greater latitude is permitted to the judges in instructing juries than to the judges of the State Courts of Indiana, and we understand the extent of this latitude to be in the

method of summing up and discussing testimony, but we do not understand that there is any rule in the Federal Courts which permits the judges in announcing the law to the jury to fully discredit with the weight of the opinion of the Judge and to argue to the jury the inconsistency of the law which he announces as the law, and we see no reason why the injury which necessarily results from this method of instructing the jury should not be recognized in this court as well as in the Supreme Court of Indiana.

Upon this question the case of *Kenner v. Bebout*, 62 Ind., 363, is strictly in point. But a single question is decided in that case, which is, that it is error in the court when properly announcing a principle of law laid down by the Supreme Court as the law of the case, to supplement it by a statement that in the opinion of the court giving the instruction, the principle so announced is erroneous.

In the case of *Danes* v. *Pearson*, Appellate Court of Indiana, 33 N.E. Rep., p. 978, the court states what everyone recognizes to be the truth, that "an act, a sentence or a word from the presiding judge may exert a controlling influence on the verdict."

It will be noticed that in this case the verdict of the jury was $9,000.00, within $1,000 of the limit fixed by the statute, and we submit that it is impossible for this court to say that this instruction of the court below did not injure the plaintiff in error.

Instruction No. 8, tendered by plaintiff in error, fairly stated the law on this subject, as it is conceded to be; but this his honor refused to give. p. 12.

He calls the attention of the jury to the fact that this request has been made of him, but thereupon gives his own opinion directly opposite, closing his remarks by conceding the instruction as requested to be the law of the case, but adding the words "not exceeding the limit of $10.000 fixed by statute."

We respectfully submit that this is not such a giving of instruction No. 8 as plaintiff in error was entitled to.

It was entitled to have the instruction given as requested, or a full and fair equivalent, without adding the weight of the opinion of his Honor against it, supplemented by an argument against it which the minds of the jury were unable to resist.

For the reasons herein urged, we respectfully submit that the judgment of the court below should be reversed, and so pray.

JOHN E. IGLEHART,
Of Counsel for Plaintiff in Error.

BUTLER, SNOW & BUTLER,
HUMPHREY & DAVIE,
EDWIN TAYLOR,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILROAD COMPANY, Plaintiff in Error, v. GEORGE CLARKE, Executor of Augustine Clark, Deceased, Defendant in Error.	In Error to the Circuit Court of the United States for the District of Indiana.

BRIEF FOR DEFENDANT IN ERROR.

MILLER, WINTER & ELAM

Carlon & Hollenbeck, Printers, Indianapolis.

Supreme Court of the United States.

OCTOBER TERM, 1893.

LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILROAD COMPANY
v.
GEORGE CLARKE, Executor.

Brief for Defendant in Error.

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

This is a judgment for damages occasioned by the death of plaintiff's testator, while riding as a passenger on the railroad of the defendant, by an accident to the train alleged to have been caused by the defendant's negligence. The accident and injury occurred on the 25th day of November, 1886, in the state of Indiana. The plaintiff's testator died on the 23d day of February, 1888, nearly fifteen months after the injury.

Section 284 of the Revised Statutes of Indiana reads as follows:

"When the death of one is caused by the wrongful act or omis-
"sion of another, the personal representatives of the former may
"maintain an action therefor against the latter if the former
"might have maintained an action, had he lived, against the latter
"for an injury, for the same act or omission. The action must be
"commenced within two years. The damages can not exceed ten
"thousand dollars and must inure to the exclusive benefit of the
"widow and children, if any, or next of kin, to be distributed in
"the same manner as personal property of the deceased."

The first and principal point made in the brief for plaintiff in error is that the action is not maintainable because, in analogy to the common law rule that a prosecution for murder could only be maintained where the victim died within a year and a day after the injury, so in this case, the complaint, showing the death more than a year and a day after the accident and injury, was bad, and the demurrer should have been sustained.

In the brief for plaintiff in error the research and ingenuity in the argument in support of this proposition are admirable, but, as we think, fall far short of establishing their contention. We shall not attempt to follow the counsel in their investigation of the musty books of the common law as applied to prosecutions for murder, appeals of death and deodands, for the reason that we think such investigations entirely foreign to the questions this court has to decide in this case. If it were necessary to go into those matters, it would be a sufficient answer to the whole argument, as it seems to us, that in neither of the three common law cases cited was the proceeding in the nature of a civil action for the recovery of damages merely, but in the nature of a criminal proceeding with a view to punishment.

Thus, in the case of Deodand in 1 Blackstone, 300, it is said:

"Hence, in every offense of an atrocious kind, the laws of England "have exacted a total confiscation of the movables or personal es- "tate, and, in many cases, a perpetual, and in others only a tempo- "rary, loss of the offenders movables or landed property, and "have vested them both in the king, who is the person who is sup- "posed to be offended, being the one visible magistrate in whom "the majesty of the public resides. The particulars of these for- "feitures will be more properly recited when we treat crimes and "misdemeanors. I therefore only mention them here for the sake "of regularity as a part of the *sensus regalis*, and shall postpone for

"the present the further consideration of all forfeitures except one "species only, which arises from the misfortune rather than the "crime of the owner, and is called the deodand. By this is meant "whatever personal chattel is the immediate occasion of the death "of any reasonable creature, which is forfeited to the king, to be "applied to pious uses and distributed in alms by his high almoner, "though formerly destined to a more superstitious purpose."

Surely, here is no analogy to be applied in the construction of a remedial statute giving civil damages to a private party.

So an "appeal" was in the nature of a prosecution for an offense, not a remedy for a private injury. After showing that in the Saxon times pecuniary satisfaction was by custom paid to the party injured, or his relations, to expiate enormous offenses, Blackstone, in Book 4, page 314, says:

"As, therefore, during the continuance of this custom, a process "was certainly given for recovery of the weregield by the party to "whom it was due, it seems that when these offenses by degrees "grew no longer redeemable, the private process was still continued "in order to insure the infliction of punishment on the offender, "though the party was allowed no pecuniary compensation for the "offense."

Thus, as is further shown by the pages of Blackstone immediately following the above citation, the appeal of death by the common law became a criminal prosecution, not a suit for private damages. The truth is, the rule contended for was simply a rule of criminal evidence, just like the rule requiring the proof against a party charged with felony to make a case beyond a reasonable doubt. Surely, in no prosecution for murder or manslaughter could a conviction be had unless the defendant were shown beyond a reasonable doubt to have feloniously caused the death. Why not insist that the same rule of evidence shall apply under this statute or Lord Campbell's act?

But, whatever may have been the common-law rule, it is enough that this action is not a common-law action, is not an inheritance of the common law, but is a new and purely statutory action; that, in the absence of the statute, it could not be maintained at all, and that by the statute the terms and limitations under which it may be maintained are carefully prescribed.

Another section of the statute of Indiana is to be considered in connection with section 284. Section 293, so far as pertinent, is as follows:

> "The following actions shall be commenced within the periods "herein prescribed after the cause of action has accrued, and not "afterwards:
>
> "1st. For injuries to person or character, and for a forfeiture or "penalty given by a statute within two years."

The action for an injury to the person did exist at common law. In support of the contention that the limitation of a year and a day must be injected into section 284, it is urged that, unless this be done, a party injured might linger many years and, then dying, the courts would be called upon to determine whether his death was caused by the alleged injury. This position is wholly untenable. The language of the statute limits the right of the personal representative to bring an action to a case where the decedent himself might have maintained the action at the time of his death. By section 293 the action in favor of the party injured would have been barred at the end of two years. By section 284 the commencement of the suit is limited, at the furthest, to two years after the death. So that the longest possible time (except the very remote contingency of a party dying after two or more years prosecution of a suit for injury and pending such suit) that could elapse, under these statutes, between the date of the injury and the commencement of the suit by the personal

representative would be four years. As a matter of fact, such a lapse of time would rarely, if ever, occur; and yet all lawyers of experience know that nothing is more common than for courts to be called upon to try and determine exactly such questions on cases commenced within the periods of limitation after the lapse of much longer time than this.

But, without more elaboration, we think this question is settled by the decisions of the courts.

In *Schlichting* v. *Wintgen*, 25 Hun, 626, the injured party lived a year and seventeen days. In a suit by his personal representatives the plea was made that he did not die within a year and a day. Opinions were delivered by two judges, each stating decidedly that the rule contended for was a technical rule of common law, having no application to a statutory civil action of this character; that, in order to make recovery, the proof must show that the cause of death was the injury inflicted by the wrongful act of the defendant, and that, this being done, the statute was satisfied.

The contention for plaintiff in error would require the court to insert in the statute a proviso. After the words, "if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission," they would read, "provided such death occurred within a year and a day after the injury." If the courts may legislate in this way, there is little need for legislatures.

Not only has plaintiff in error found no decided case sustaining his contention, but the decisions looking to the opposite view are numerous.

In *Hecht* v. *The O. & M. Ry. Co.*, 132 Ind. 511, the injured party had brought a suit and recovered damages in his life time and the judgment had been paid. Afterward, he having died, his personal representative

brought a suit under section 284. Upon a full discussion the Supreme Court of Indiana decided that the latter suit could not be maintained because at the time the injured party died he could not have maintained a suit himself. The court says:

"The wording of Lord Campbell's act and the statute of this "state differ somewhat, but are in effect the same. The purpose "of each was to give to the personal representative of the deceased "a right of action, if the deceased at the instant of his death would "have had a right of action for the same act or omission had he "survived."

This statement and limitation is repeated three or four times in the course of the opinion, so that the language can not be claimed to have been used inadvertently. The test is, did the deceased, just before he died, have a right of action? If so, then his personal representative has a right of action. Now, will anybody pretend that the deceased, having been hurt without fault by the wrongful act of another, would not continue to have a right of action himself every minute until the expiration of the two years' limitation? If so, how, without judicial legislation, is any court to say that, the injured party having died during the last twelve months of the two years, his personal representative has no right of action?

In *Reed* v. *The Northeastern R. R. Co.*, 16 S. E., p. 289 (37 S. C., 42), the Supreme Court of South Carolina, under a similar statute, had before it the case of a party whose death was instantaneous and it was contended that in such case no action would lie. That court says:

"The action brought for the benefit of his family must be limited "to the character of the circumstances surrounding the deceased "himself when injured. This being so, it makes no difference if the "deceased was killed instantaneously or lingered an hour, a day, a "month, or year, or two years from the date of the accident, for if "the defendant (decedent) did not himself sue to judgment or re-

"lease his right of action, then the right of action as provided in "the statute remains for the benefit of his family."

The same court, in *Price* v. *The Railroad Co.*, 12 S. E. 413 (33 S. Car. Rep. 562), reached the same conclusion.

Littlewood, etc., v. *New York, etc.*, 89 N. Y. 24, was a case similar to the Indiana case above cited, and resulted in a like conclusion.

Reed v. *The Great Eastern R'y Co.*, Law Reports 3 Queen's Bench, 555, was a case under Lord Campbell's Act, where the party had made a settlement in his lifetime, and it was held that such settlement was a good bar to an action by his legal representative. The first reason given for the decision was that the right of the personal representative to recover depended upon the right of the decedent to maintain an action at the time of his death, and, the latter having made a settlement, of course no right of action existed in favor of the former.

All of these cases recognize and assert that this action is new; that it is purely statutory; that, while it is not a continuation of the action in favor of the injured party, yet the cause of action in favor of his personal representative is substantially the same—that is, that it depends upon the wrongful act of the defendant, and the absence of wrongful contribution on the part of the plaintiff or of his decedent, and that, wherever the latter might have maintained an action at the moment of his death, a cause of action exists in favor of the personal representative, subject only to the limitations prescribed by the statute. It is proper to say that the Littlewood-case, in 89th New York, overrules the case of *Schlichting* v. *Wintgen*, in so far as it was held in the latter case that a settlement made by the decedent was not a bar to an action by the personal representative.

The case of *Littlewood*, *supra*, is cited with approval by the Court of Appeals of New York in *Murray* v. *Usher*, 117 New York, p. 548.

Sherman and Redfield on Negligence (4th edition), section 640, say:

> "The foundation of every action of this kind is in the injury "which caused the death, and not merely the fact of the death "itself. If, therefore, the injured person recover damages for that "injury during his lifetime, makes settlement and releases his "claim, or, under the English statute, has contracted with his em- "ployer that the benefit of the statute shall not be claimed, his "representative can not maintain an action upon his subsequent "death resulting from the injury."

So, Cooley on Torts, pp. 263 and 264, speaking of Lord Campbell's Act, and similar statutes, says:

> "In other words, it continues for the benefit of the wife the "right of action which at common law would have terminated at "death, and enlarges its scope to embrace the injury resulting from "the death. If, therefore, the party injured had compromised for "the injury, and accepted satisfaction previous to death, there "could have been no further right of action, consequently no suit "under the statute."

For the same reason, he says, "contributory negligence, or that the injury was the result of the negligence of a fellow-servant, would be a defense."

That the *gravamen* of the cause of action, though given to different persons, is substantially the same, is is shown by the decision of the Supreme Court of Indiana in *The Indianapolis, etc., R. R. Co.* v. *Stout's Admr.*, 53 Ind. 158. Stout had been injured and in his lifetime had brought an action which went to the Supreme Court and is reported in the 41st Indiana, on page 149. After judgment in favor of the plaintiff had been reversed, Stout died. Thereupon this action was brought by his administrator. The question was whether the testimony of a deceased witness, taken in

the former cause, could be used in this cause. The court held that the cause of action in the two cases was substantially the same, and that the evidence could be so used.

The statute of the state of Connecticut (General Statutes of Connecticut, revision of 1875, p. 422, section 9) reads as follows:

> "All actions for injury to the person, whether the same do or do "not instantaneously, or otherwise, result in death, * * * shall "survive to his executor or administrator; provided the cause of "action shall not have arisen more than one year before the death "of the deceased."

If the common law limitation of a year and a day applies, where was the need for the express limitation of this statute?

The statute of Massachusetts, like that of Connecticut, limits the right to bring the suit to "one year from the injury causing the death."

The statute of Pennsylvania fixes the limitation at one year after the death.

This court holds that the statute creates a new liability, and that these limitations attach, not merely to the remedy, but to the right which is granted only subject to them.

The Harrisburg, 119 U. S. 199; see p. 214.
Dennick v. *R. R. Co.*, 103 U. S. 11.

II.

The second point made by plaintiff in error is, that the court erred in allowing the introduction of evidence in regard to the business and income of the decedent, for the purpose of enabling the jury to fix the damages. Counsel for plaintiff in error admit that there is conflict of ~~testimony~~ opinion on this subject and cite but a single

decision in support of their contention. We do not think there is much conflict on the subject and submit that the evidence was not only proper, but necessary in order to enable the jury to arrive at a correct result. If the jury are to make a finding, they must have facts upon which to base that finding. As the Court of Appeals of New York tersely put it in the case of *Houghkirk* v. *The President, etc.*, 92 N. Y., p. 219:

"These items of damages, so far as possible, should be proved, in order that the jury may 'judge,' not merely 'guess.'"

Without stopping to discuss the question upon principle, the attention of the court is called to some of the very numerous decisions upon this subject.

In *Hall* v. *Galveston, etc.*, 39 F. R. 18, Judge Maxey holds that in proving damages to a father on account of the death of his son the testimony "may include the circumstances of the deceased, his occupation, age, health, habits of industry and sobriety and economy, his skill and capacity for business, the amount of his property, his annual earnings and the probable duration of his life." Citing *Railroad Co.* v. *Cowser*, 57 Texas, ~~498~~ 293

So in *Howard* v. *Delaware, etc.*, 40 F. R. 195, it is held by Judge Wheeler proper that the jury shall take into consideration the fact that the deceased, a man in middle life, had not so far accumulated any property, and hence it was for the jury to consider whether it was likely that in the future there would be such accumulation.

In *Clapp, Admnx.*, v. *Minneapolis, etc., R. R.*, 29 N. W. (36 Minn. 26), p. 340, it was adjudged proper that the jury should consider the injury to the decedent's business by his death, his capacity to earn money, his

health and general condition of life as they should find from the evidence before them.

In *Pa. Tel. Co.* v. *Varnau*, 15 Atl. Rep., p. 624, it is adjudged by the Supreme Court of Pennsylvania that:

"The proper measure of damages is the pecuniary loss suffered "by the parties entitled to the sum to be recovered, without any "*solatium* for distress of mind; and that loss is what the deceased "would probably have earned by his intellectual or bodily labor "in his business or trade the residue of his lifetime and which "would have gone for the benefit of his wife or child, taking into "consideration his age, ability and disposition to labor and his "habits of living and expenditure."

In *Central R. R., etc., Co.* v. *Rouse*, 5 S. E., p. 627 (77 Ga. 393), the Supreme Court of Georgia adjudged that in estimating the value of the life of the deceased they

"Should take into consideration his age, health, habits, occupa- "tion, expectation of life, ability to labor and to furnish care and "attention to the family, probable increase or diminution of that "ability with lapse of time and rate of wages. When you ascer- "tain the value of the husband's life you should deduct his per- "sonal expenses from the gross amount and reduce the balance to "its present value; and that would be the value of the life which "the widow would be entitled to receive if it should appear that "she was entitled to recover. It is simply a question of the value "of Rouse's life. If you should think that the plaintiff was entitled "to recover for his death, and in the making of such valuation he "ought to be treated as any other producer, chargeable upon his "income with his own individual expenses. These would deter- "mine his value to his family or his estate. Ascertain what his "value to his family, including his earnings or income, would be. "Arrive at the gross amount. Then take what he would have to "lay out as a producer to render the service or acquire the money "that he might be expected to produce. Reduce the net result to "its present value and this is the result that you ought to find if "you think that the plaintiff ought to recover anything under the "testimony."

In the *Board of Commissioners of Howard County* v. *Legg*, 110 Ind. 479, the Supreme Court of Indiana held

that the fact that the plaintiff's intestate was a laboring man, the evidence tending to show that he was sober, industrious and a competent laborer, providing for his family as best he could under all the circumstances, was thirty-six years of age, were all facts proper to be considered in estimating the damages.

This whole subject of what is proper to be proved with reference to the estimate of damages is quite fully considered by Judge Knowles in *Sorenson* v. *Northern Pacific*, 45 F. R. 407, where he holds that evidence as to the earnings, habits of saving, etc., are all proper to be proved and considered by the jury. From a decision by Judge McCreary in *Collins* v. *Davidson*, 19 F. R. 83, he quotes as follows:

"In determining this amount, if you come to the question, you "may consider any evidence before you tending to show what was "the reasonable expectation of pecuniary benefit to said heirs from "the continuance of his life, the age of the deceased, his pecuniary "circumstances, his habits of industry, his accustomed earnings, "measure of success in business and the like, as far as they appear "in evidence are proper to be considered."

A decision very directly in point, by the Supreme Court of Indiana, is *Hudson* v. *Houser, Admr.*, 123 Ind. 309. In that case the daughter of the deceased was permitted to state, over the objection of appellant, the household and living expenses of her father's family per year for several years. She had testified as to having kept the expense account of the family and the court permitted her to state, from the knowledge she had gained because of having kept the expense account, what in her opinion the expenses of the family were during the years 1881, 1882, and 1884. The court says:

"We think this testimony was competent. It tended to show "the loss sustained by the decedent's family because of his death."

But it is needless to cite other authorities for the

question has been directly and repeatedly adjudged in this court.

In *Wade* v. *Le Roy*, 20 How. 34, it was held competent in an action for personal injuries that the plaintiff might show that he was engaged in a particular business and had been incapacitated from attending to it, as exhibiting the extent of the injury, and this although the nature of his occupation was not set forth in the declaration. Indeed, the objections made to the evidence by so eminent counsel as Mr. O'Connor were all based upon the proposition that no special damages were alleged in the complaint. In the case at bar, however, these special damages are alleged as proved, with great particularity.

In *Nebraska City* v. *Campbell*, 2 Black, 500, where a physician was the plaintiff, it was held competent for him to show the nature and amount of his business for the same purpose.

The same doctrine was reaffirmed in *The District of Columbia* v. *Woodbury*, 136 U. S. p. 450. On page 459 Mr. Justice Harlan, speaking for the court, says:

> "All evidence tending to show the character of his (plaintiff's) "ordinary pursuits, and the extent to which the injury complained "of prevented him from following those pursuits, was pertinent to "the issue."

That the same principle thus applied in cases for personal injuries is applicable in actions for damages on account of the death of the injured party, is clear in principle, as is recognized by this court in citing the case of *Railroad Company* v. *Baron*, 5 Wallace, 90, a case of the latter character, on page 460 of the Woodbury case.

III.

The third and last point made in the brief for plain-

tiff in error is that the circuit court erred in its instructions to the jury. The argument is that while the instructions given by the court were according to law, yet that something was injected into them in the way of comment which was not proper. We submit that this objection is not well taken for two reasons:

1st. The objection is not sufficiently specific to be available under the rules of this court. Rule 4 reads as follows:

"BILL OF EXCEPTIONS.

"The judges of the circuit and district courts shall not allow any "bill of exceptions which shall contain the charge of the court at "large to the jury in trials at common law upon any general excep- "tion to the whole of such charge, but the party excepting shall be "required to state distinctly the several matters of law in such "charge to which he excepts; and those matters of law, and those "only, shall be inserted in the bill of exceptions and allowed by "the court."

In the transcript, commencing near the bottom of page 12 and ending near the bottom of page 14, being about two pages, we find the instructions given by the court to the jury. These instructions are not numbered or paragraphed, but apparently were instructions orally given and taken down or written out. Near the bottom of page 14, and at the end of the instructions, we find the following:

"To which instructions so given by the court, and to each and "every one thereof, the defendant at the time excepted."

Here is an exception directly, as it seems to us, within the inhibition of Rule 4. There is not a word calling the attention of the court or opposing counsel to any particular part of the instructions as objectionable, but it is a general exception to the whole. Not only is this unwarranted under the rule, but an exception so taken is unavailing under the decisions of this court.

Thus, in *Van Stone* v. *Stillwell, etc.*, 142 U. S. 128, on page 135, Mr. Justice Lamar, speaking for the court, says:

"There was a general exception to the charge of the court as a "whole, but such an exception can not be considered here, under "well-settled rules of law."

Lucas v. *Brooks*, 18 Wallace, 436.
Burton v. *West Jersey, etc.*, 114 U. S. 474.

Both of the cases so cited are directly in point. See *Lucas* v. *Brooks*, on page 456, and the Burton case on page 476. In the latter case Mr. Justice Harlan says:

"The general exception to the charge did not direct the atten- "tion of the court to the particular portions of it to which the "the plaintiff objected. It, therefore, raises no question for re- "view by this court. *Conn., etc.*, v. *Union, etc.*, 112 U. S. 250, 261, "and authorities there cited."

In the Connecticut case, last cited, the exception was much more definite than in the case at bar. It was "to the charge of the eighth proposition as modified by "the court and embraced in his general charge."

Mr. Justice Harlan, on pages 260–261, says:

"The eighth proposition submitted by the defendant was given "in the words already quoted from the charge, with the modifica- "tion that the jury were to determine on the evidence whether the "insured had the before-mentioned attacks of malarial fever, ac- "companied by cerebral engorgement. That modification was en- "tirely proper since it was the province of the jury to determine "the weight of the evidence. *Cushman* v. *U. S. Life Ins. Co.*, 70 N. "Y. 77. If the subsequent part of the charge, which is now re- "ferred to as discrediting Dr. Baner's certificate as evidence of the "facts stated in it, was regarded at the trial as a modification of "the defendant's eighth proposition, or as objectionable in itself, "the exception taken should have been more specific. The atten- "tion of the court should have been called to the particular point "by something more definite than the general exception taken." Citing numerous authorities.

Finally, in *Lincoln* v. *Claflin*, 7 Wallace, on page 139, the court says:

> "It is possible that the court erred in its charge to the jury up-
> "on the subject of damages in directing the jury to add interest to
> "the value of the goods. Interest is not allowable as a matter of
> "law except in cases of contract or the unlawful detention of
> "money. In cases of tort its allowance as damages rests in the
> "discretion of the jury, but the error, if it be one, can not be taken
> "advantage of by the defendants, for they took no exception to the
> "charge on that ground. The charge is inserted at length in the
> "bill, contrary to the proper practice as repeatedly stated in our
> "decisions, and contrary to an express rule of this court. It em-
> "braces several different propositions, and a general exception in
> "such case can not avail the party if any one of them is correct."

It is true the exception here is to the instructions and each of them, but there is nothing directing the attention of the court to any particular matter complained of, as required by the rule.

It is proper to say, also, that the assignment of errors in this court is not even so definite as the exception. It is as follows:

"5th. The court below also erred in instructions given of its own motion, as set out at length in the bill of exceptions No. 2, above referred to, and which exceptions were properly taken at the time."

It is quite clear that the plaintiff in error can get no help for his exceptions, therefore, in his assignment of errors.

2. But we insist that there is no error in the instructions. The judge states his former ruling, admits that the court whose authority he recognizes has decided otherwise, and then, though his own impressions are unchanged, unequivocally and emphatically instructs the jury that they are to accept the law as thus decideded by the Supreme Court of Indiana. In this, certainly, we think there is no error. Whatever might

be the rule in the state court, the practice in the Federal Court in relation to instructions allows great freedom to the trial judge. Moreover, the relation of the circuit court to the Supreme Court of the state is not the same as the relation of the state circuit court to the state Supreme Court. As between the two latter courts the relation is that of superior and inferior. The decisions of the Supreme Court of the state are not binding upon the state circuit courts merely because they are decisions of a court of high respectability and authority, but they are binding as matter of law. Especially was this true in the case from 62d Indiana cited in the brief for plaintiff in error, where the proposition questioned by the circuit judge was not merely the settled general law of the state, but had been adjudicated as the specific law of the particular case on a former appeal. Moreover it is not clear that the charge, as asked and given, ought not to have been qualified ~~as~~ explained, at least as to children. *Board* v. *Legg*, 93 Ind. 523.

In conclusion, so far as appears, the case was fairly tried. The result is, so far as shown, fully justified by the evidence. The fact that the verdict is $9,000 as damages for taking the life of a man forty-two years old, in good health, with a large business and large business capacity, earning an income, over and above the expenses of himself and his family, of $3,000 to $4,000 a year, and leaving a wife and minor children, is certainly no evidence that the jury was misled either as to the law or the facts. The case being thus fairly tried, even were there technical errors of a much more substantial nature than anything alleged in the case at bar, the action of the court ought to be ruled by the principle embodied in section 1891 of the Revised Statutes of Indiana.

"In the consideration of the questions which are presented "upon an appeal, the Supreme Court shall not regard technical "errors or defects, or exceptions to any decision or action of the "court below which did not, in the opinion of the Supreme Court, "prejudice the substantial rights of the defendant."

Respectfully submitted,

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